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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

Marguerite Owens Harrell, by her Parents, Allen W. Harrell and Irene Burk Harrell,
Petitioner,

v.

Wilson County Schools, Dr. W. O. Fields, Jr., Superintendent and North Carolina Department of Public Instruction, Dr. A. Craig Phillips, Superintendent
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

GROVER PREVATTE HOPKINS
Counsel of Record for
Petitioner
Hopkins and Allen
212 Main Street
Tarboro, N.C. 27886
Tel. No. (919) 823-1156

JANICE WATSON DAVIDSON
Of Counsel
212 Main Street
Tarboro, N.C. 27886
Tel. No. (919) 823-1156

QUESTIONS PRESENTED

I. Whether assessment, evaluation and placement procedures comply with due process and the requirements of the Education of the Handicapped Act and its federal regulations where the evaluation forms were only partially completed, information was not obtained with regard to prior educational background or from former teacher, a continuum of alternative placements was not considered and a biased state consultant was utilized.

II. Whether an Individualized Education Program is responsive to the special educational needs of a hearing impaired child as required by the Education of the Handicapped Act and its federal regulations where the statement of educational performance relied solely on the test score of

the Peabody Individual Achievement Test, the percentage of time spent in the regular classroom and with support services was yet to be determined and only one of the special services providers had been trained to work with hearing impaired children.

III. Whether a local school system could provide an educational program which was "appropriate" to meet the special educational needs of a hearing impaired child pursuant to the Education of the Handicapped Act and its federal regulations where the evaluation and placement procedures and Individualized Education Program development were made upon unlawful procedures and the regular classroom teacher and all but one of her special service providers were not certified to teach children with hearing impairments.

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Board of Education v Rowley, ____ U.S. ____, 102 S.Ct. 3034 (1982). . . . 25, 26, 27, 31

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20 U.S.C. §1415(e)(2) 26

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OPINIONS

The opinion of the North Carolina Court of Appeals is reported at 58 N.C. App. 260, 293 S.E. 2d 687 (1982) and is printed in Appendix A hereto. The judgment of the North Carolina Supreme Court is unpublished and appears at Appendix B hereto. The Judgment of the Wilson County Superior Court is unpublished and is printed in Appendix C hereto. The decision of the State Review Officer appears at Appendix D hereto, and the decision of the Hearing Officer appears at Appendix E hereto.

JURISDICTION

The judgment of the North Carolina Court of Appeals (Appendix A) was entered on July 20, 1982. A timely notice of appeal and petition for discretionary review were denied by the North Carolina Supreme

Court on October 7, 1982. (Appendix B). The jurisdiction of the Supreme Court is invoked under 28 USC §1257 (c).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the Education for All Handicapped Children Act of 1975 which is found in 20 USC §1401, et seq. The Act's pertinent text is printed in Appendix F.

Additionally, the federal regulations under Part B of the Education of the Handicapped Act are involved. These regulations are found at 34 CFR Part 300. The regulations' pertinent text is printed in Appendix G hereto.

This case also involves the first section of the Fourteenth Amendment to the Constitution of the United States, which

provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was born deaf on December 20, 1964 (R pp 9, 54). She has a severe hearing impairment which has been diagnosed as a moderate to profound bilateral sensorineural hearing loss. Petitioner is a child with special needs entitled to a free appropriate publicly supported education pursuant to the Education for all Handicapped Children Act of 1975. (R p 103; Exhibit H-3).

From the time the Petitioner was a young child, her parents enrolled her in various oral programs for hearing impaired children. (R pp 9, 10, 27, 38; Exhibit H-8). She was enrolled at the Central Institute for the Deaf in St. Louis, Missouri, and had never been enrolled in the Wilson County School System when these

proceedings were begun. (R pp 27, 103, 128).

Mrs. Irene B. Harrell, mother of Petitioner, instituted these proceedings by sending a letter to Dr. W. O. Fields, Jr., Superintendent of the Respondent school system which requested an application for an education expense grant for the education of the Petitioner at the Central Institute for the Deaf. Said request was received on June 14, 1978. (R pp 13, 27, 103, 128; Exhibit S-1). This was the second such request for aid and assistance for the education of Petitioner. (R pp 12, 39; Exhibit H-8). Petitioner's mother returned the completed education expense grant application and accompanying records to the Respondent school system by letter dated July 14, 1978. (R p 29; Exhibit S-3).

The Respondent school system conducted an evaluation of Petitioner in order to determine whether or not an appropriate educational program was available to Petitioner in the Respondent school system. During the evaluation, evaluation forms were only partially completed, information was not obtained with regard to Petitioner's prior educational background or from former teachers, a continuum of alternative placements was not considered and a biased state consultant was utilized. The assessment, evaluation and placement procedure forms used by Respondent were not strictly followed during the assessment, evaluation and placement of Petitioner.

Form EC-1 is a teacher referral form. (Exhibit S-12, Form EC-1). Educational data, such as Petitioner's existing school

records, were not obtained for Form EC-1 nor for any of the other forms during the screening process. (Exhibit S-12).

Pupil observation is the focus of Form EC-2. (Exhibit S-12, Form EC-2). Petitioner was observed by a school psychologist at a conference on July 26, 1978 which was attended by Petitioner's mother and several other adults. At this conference, the psychologist noted that the Petitioner was able to use speech, language and speechreading skills. (Exhibit S-12, Form EC-2). No information was obtained with Petitioner in a classroom setting. Such important data as activity level, attention span and concertration in the classroom was not obtained either first-hand nor by contacting Petitioner's teachers at the Central Institute for the Deaf. (Exhibit S-12, Form

EC-2). No data was obtained with regard to Petitioner's socialization skills while interacting with her peers in the classroom. (Exhibit S-12, Form EC-2).

Form EC-3 is entitled Conference Report Completed by Referring Teacher, Principals, and Exceptional Child Teacher. The report on this form merely states "See conference report dated 7/29/78." Exhibit S-12, Form EC-3). However, the explanatory sheet for Respondent School System's Procedures for the Referral, Screening, Assessment, and Placement of Exceptional Children states that the information should relate to a consideration of the proper placement of the child. Said report is to be completed by "referring teacher, principals, and exceptional child teacher." (Exhibit S-12).

Educational functioning is to be evaluated and the data recorded on Form EC-4. Petitioner's educational functioning evaluation consists only of the Peabody Individual Achievement Test scores obtained by the school psychologist. However, neither Appellant's school records from the Central Institute for the Deaf nor samples of the work she had done there were included in her educational evaluation. (Exhibit S-12, Form EC-4).

The two conferences of August 11, 1978 and August 14, 1978 appear to be the only additional occurrences from the time of the psychological evaluation of August 4, 1978, as recorded on Form EC-4, to the decision of the placement committee to place Appellant in a "regular classroom with appropriate support services," as recorded on

Form EC-7 dated August 17, 1978. (Exhibit S-12, Forms EC-4 and EC-7). Form 4-A was completed by Appellant's mother on July 31, 1978, Form EC-5 was marked as "not applicable" and Form EC-6 was merely a parental permission form for psychological testing which had been given previously (Exhibit S-12, Forms 4-A, EC-5 and EC-6).

The purpose of the August 11 conference as stated on the conference report was "(t)o further discuss Marguerite's case in consultation with Mrs. Blackburn." (Exhibit S-9). Mildred Blackburn is a consultant for Programs for Hearing Impaired with the State Department of Public Instruction. Placing the Petitioner in the Respondent school system was mainly discussed at this consultative meeting even though the only tests or records Respondent school system

possessed with regard to Petitioner's educational functioning were the results of an achievement test which had been administered by the psychologist employed by Respondent school system. (Exhibit S-9 and S-12, Form EC-4). At the local hearing, Mrs. Blackburn stated, "I would not recommend a residential school for a hearing impaired child." (R p 85). A few sentences later she again expressed her opinion with regard to the placement of a hearing impaired child in a residential center.

> "I wouldn't say I would never recommend a residential program. But I would say at this point in time that a child would almost have to be a vegetable. The kind of child who really has no hope for a

> normal life at all, for living, loving, you know, being involved in a home." (R p 85).

The August 11, 1978 conference report states that "(t)he most frequently discussed placement alternative was one in which Marguerite would attend the public school system in Wilson County," and then goes on to disclaim "although this discussion does not imply that such a placement had been decided upon by anyone involved." The report then goes on to enumerate a number of recommendations to be followed in case placement in the public school system is decided upon. There is nothing in the conference report to show that there was any discussion of other options. (Exhibit S-9).

The conference report of August 14, 1978 also shows that the full realm of possible placement alternatives was not being considered. This report states, "The possible placement alternatives were discussed by all members present, ranging from a public school setting with support services to ENCSD (Eastern North Carolina School for the Deaf) placement to placement in a public school program outside Wilson County." (Exhibit S-10). The Eastern North Carolina School for the Deaf is a "total communication" residential school which employs the use of finger-spelling and sign-language. The alternatives mentioned do not include the possibility of placement in a strictly "oral/aural" residential school where sign language is not used, although this is the type schooling Petitioner had been attend-

ing for the past five years. (Exhibit S-10).

Form EC-7 also recommends a meeting with Petitioner's parents so that an IEP (Individualized Education Program) can be developed for Petitioner (Exhibit S-12, Form EC-7). Said IEP conference was held on August 22, 1978. The purpose of the conference as described by the conference report is "To discuss with Mrs. Harrell and get her input into the development of an individualized education plan (IEP) and necessary support services for Marguerite to attend the Wilson County school system in the 1978-79 year." (Exhibit S-11). This shows that Petitioner's placement in a regular sixth grade classroom had already been determined and was no longer open to discussion. However, the reason for this confer-

ence was to determine Petitioner's special needs and to decide what support services would then be required to meet those special needs. (Exhibit S-11).

Form EC-9 is a committee report to the administrative review committee which recommends that Appellant be placed in a "regular sixth grade with related services of speech therapist, resource teacher and psychologist." The form additionally states that the "(r)easons for this recommendation can be found on forms EC-1 through EC-9." (Exhibit S-12, Form EC-9). This form is dated August 22, 1978 although the IEP was not completed until August 28, 1978. (Exhibit S-12, Form EC-8 and Form EC-9). Form EC-10 dated August 28, 1978, is the administrative review committee recommendation which also recommends that appellant be

placed in a regular sixth grade class with support services. (Exhibit S-12, Form EC-10).

Respondent school system decided it could provide an appropriate educational program for Petitioner by placing her in a regular sixth grade classroom with supportive services. An Individualized Education Program was developed for the Petitioner which relied solely on the test scores of the Peabody Individual Achievement Test which had been administered by the Respondent school system, the percentage of time spent in the regular classroom and with support services was yet to be determined and only one of the special services providers had been trained to work with hearing impaired children. Petitioner's application for an educational expense grant was

subsequently denied.

The Individualized Education Program (IEP) developed for Petitioner was not properly developed. The Respondent school system's statement of educational performance relies solely upon the Peabody Individual Achievement Test scores which had been administered to the Petitioner by the Psychologist employed by the Respondent school system. (Exhibit S-12, Form EC-8, IEP).

Short term objectives are merely stated "1. Speach Therapy, II, Classroom aide, III. Phonic ear and IV. Resource teacher." (Exhibit S-12, Form EC-8, IEP). The IEP states that the percentage of time spent with support services and the percentage of time spent in the regular classroom is "to be determined by child's needs."

(Exhibit S-12, Form EC-8, IEP).

Of the personnel responsible for either teaching the Petitioner or providing special services to her, only Rosalee Wooten, the resource teacher, was trained to work with hearing impaired children. (R p 110). However, at the local hearing, Ms. Wooten stated that she was currently serving sixteen children and that another resource teacher would need to be hired should Petitioner require much time with a resource teacher. (R p 95). The school system's psychologist, Paul Speziale, who would presumably be Petitioner's psychologist, interpreted Petitioner's IQ scores in a manner which was inappropriate for a child with a hearing impairment (R p 120) and Gloria Ellis, the speech therapist who was to provide speech therapy to Peti-

tioner, was not sure how to communicate with a hearing impaired child. (R pp 92, 117). So, the "experts" who were to provide special services to Petitioner were either overloaded with children for whom they were to provide services or knew practically nothing about hearing impaired children. The regular classroom teacher was not certified in the education of hearing impaired children. (R p 110). Lack of familiarity with the education and the special needs of hearing impaired children indicate the personnel assigned to provide either regular or special services to Petitioner would have been unable to provide for her special needs.

Petitioner requested a hearing, which was held on October 11, 1978. (R pp 34-101). The hearing officer found that

the Respondent school system could provide an appropriate education for Petitioner in its public schools. (R pp 30, 111-112). Petitioner's parents appealed the hearing officer's decision to the State Education Agency. (R pp 30, 112-116). A state review hearing was held on December 20, 1979. (R pp 30, 116-124). The state review officer upheld the decision of the local hearing officer. (R pp 31, 132).

WHERE FEDERAL QUESTIONS WERE RAISED

Petitioner's petition for judicial review to the Wilson County Superior Court stated that Respondent school systems findings, inferences, conclusions and decisions were in excess of statutory authority, affected by error of law, unsupported by the evidence, arbitrary or capricious and violative of the constitutional right to due

process. Using the "whole record" test, the court affirmed the decisions of the hearing officer and the review officer.

The three federal questions sought to be reviewed were raised by exceptions and assignments of error in the North Carolina Court of Appeals.

The due process part of the first issue was dealt with at 58 N.C. App. 260, 265-267. Regarding this issue, the Court of Appeals found that "the predisposition or professional theory which Mrs. Blackburn had, and brought to the Committee, was not enough to constitute bias and a violation of due process." Id., at 267.

The remainder of the first issue deals with the procedures followed during the assessment, evaluation and placement of the Petitioner. The Court of Appeals found

that "the Wilson School System conducted the required screening and evaluation of Marguerite." Id., at 269-270. While discussing both the assessment of Petitioner as well as the IEP formulated for her, the Court stated: "It is clear to us that the school system complied with the applicable regulations." Id., at 270.

Additionally, the Court of Appeals found that the Respondent school system was not required to obtain information with regard to Petitioner's prior educational background or from former teachers.

> "[T]he regulations do not require, as plaintiff suggests, that the records from the CID, her report cards, and work samples be considered by the committee as it reached its

> decision. The statutes and regulations require that a multi-disciplinary diagnosis and evaluation be performed by the school system. (Cites omitted.) This the school system did." 58 N.C. App. at 271.

With regard to the lack of consideration of a continuum of alternative placements, the Court of Appeals noted that "several alternatives were discussed." Id., at 270.

The second issue deals with the Individualized Education Program which was developed for the Petitioner. The Court of appeals found no merit to the argument that the statement of educational performance

relied solely on the Peabody Individual Achievement Test. 58 N.C. App. at 271. It also found that while the percentage of time to be spent in the regular classroom and with support personnel should have been more specifically determined, it was the opinion of the Court that "the answers were sufficient." Id., at 272.

The Court of Appeals did not specifically address the problem addressed in both questions two and three concerning the fact that Petitioner's regular classroom teacher and all but one of her special service providers were not qualified to teach children with hearing impairments. The Court did, however, state that the placement of Petitioner in a regular classroom with support services was consistent with federal regulations. 58 N.C. App. at

270-271.

The crux of the third issue deals with whether or not the educational program offered to Petitioner was appropriate. This question was addressed by the Court of Appeals in light of the United States Supreme Court decision in Board of Education v Rowley, 50 U.S.L.W. 4925 (28 June 1982). 58 N.C. App. at 264. The Court of Appeals found that the Respondent school system had fulfilled its obligation to provide a free, appropriate education to Petitioner and "that the decision was not affected by error of law. Id., at 265."

REASONS FOR GRANTING THE WRIT

In Board of Education v. Rowley, ____ U.S. ____, 102 S.Ct. 3034 (1982) this Court first addressed the requirements which must be met to comply with the Education for All

Handicapped Children Act. The Rowley Court set forth the issues which must be considered by a Court reviewing the state administrative findings and decisions in a civil action pursuant to 20 U.S.C. §1415(e)(2). Petitioner asserts that the reviewing Courts in the case sub judice have failed to follow the guidelines for review which must be followed.

The Rowley Court directed that judicial review of the administrative actions should concentrate on two questions.

> "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedure reasonably calculated to enable the child

to receive educational benefits?" 102 S.Ct. at 3051.

Petitioner asserts that the answer to the first question is "No." Assessment, evaluation and placement procedures were not properly followed during the assessment evaluation and placement of Petitioner.

The evaluation forms used by Respondent school system were only partially completed. ((Exhibit S-12). No data was obtained from Petitioner's teachers at the Central Institute for the Deaf with regard to Petitioner's academic performance, socialization skills or adaptive behavior. (Exhibit S-12, Forms EC-1, EC-2, EC-3, EC-4). Teacher recommendations, social background and adaptive behavior should be included in evaluation and placement proce-

ures. 34 C.F.R. 300.533(a)(1).

Petitioner's educational functioning evaluation consists only of the Peabody Achievement Test Scores. (Exhibit S-12, Forms EC-4, EC-3). These scores were interpreted inappropriately for a child with a hearing impairment. (R p 120). 34 C.F.R. 300.532 deals with evaluation procedures. It states that test results for a child with a sensory impairment should "accurately reflect the child's aptitude or achievement level...rather than reflecting the child's impaired sensory...skills...."

A continuum of alternative placements is mandated by 34 C.F.R. 300.551. Instruction in an institution should be an included alternative placement. 34 C.F.R. 300.551(b)(1). However, an oral-aural school such as the on Petitioner had been

attending was not considered. (Exhibits S-9, S-10). This may be explained in part by the bias of Mildred Blackburn, a consultant for Programs for Hearing Impaired with the State Department of Public Instruction. Mrs. Blackburn stated at the local hearing that she "would not recommend a residential school for a hearing impaired child." (R p 85).

The Individualized Education Program (IEP) prepared for a handicapped child must include, among other items, the child's educational performance levels as well as a statement of the amount of time the child is to be in the regular classroom and the percentage of time the child is to receive special services. 34 C.F.R. 300.346. However, the Respondent school system's statement of educational performance relies

solely upon the Peabody Individual Achievement Test scores which have been discussed previously. (Exhibit S-12, Forms EC-4, EC-8, IEP). In addition, the IEP states that the percentage of time to be spent in the regular classroom and the percentage of time to be spent with special services is "to be determined by the child's needs." (Exhibit S-12, Form EC-8, IEP).

Petitioner submits that since the procedures followed during the assessment, evaluation and placement of Petitioner as well as the IEP procedures were improper, that the substance of Petitioner's educational programs which was based on these procedures was also improper.

In the case sub judice, the North Carolina Court of Appeals found that the procedures of the Act had been adequately

followed and that the Respondent school system could provide an appropriate education for the Petitioner. The Petitioner asserts that this decision is in conflict with the decision of the Rowley Court since the procedural requirements of the Act were not properly followed. The Procedural conflicts should be resolved by this Court in order to establish a uniform approach to judicial review of the Act's procedures.

CONCLUSION

Wherefore, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

Grover Prevatte Hopkins
Attorney of Record
for Petitioner
Hopkins and Allen
212 Main Street
Tarboro, North Carolina 27886
(919) 823-1156

Janice Watson Davidson
Of Counsel
Hopkins and Allen
212 Main Street
Tarboro, North Carolina 27886
(919) 823-1156

APPENDIX A

OPINION

No. 817SC793

NORTH CAROLINA COURT OF APPEALS

Filed: July 20, 1982

Re: Marguerite Owens Harrell, by her parents, Allen W. Harrell and Irene Burk Harrell (Appellant) v. Wilson County Schools, Dr. W.O. Fields, Jr., Superintendent, and North Carolina Department of Public Instruction, Dr. A Craig Phillips, Superintendent (Appellees)

Appeal by plaintiff from Stevens, Judge. Judgment entered 27 February 1981 in Superior Court, Wilson County. Heard in the Court of Appeals 31 March 1982.

This appeal questions whether the Wilson County School System properly determined that a 13-year-old hearing impaired

child would receive a free appropriate education by placing her in a regular sixth grade class within the Wilson Public Schools instead of providing a grant to subsidize the child's education at an out-of-state residential institution.

Hopkins & Allen, by Janice Watson Davidson and Grover Prevatte Hopkins, for plaintiff appellant.

Rose, Jones, Rand & Orcutt, P.A. by Z. Hardy Rose and L. Patrick Fleming, Jr., for defendant appellees.

BECTON, Judge.

I

On 17 July 1978, the parents of Marguerite Harrell, a hearing impaired child, applied to the Wilson County Schools for a grant, pursuant to G.S. 115-363 (1977), to cover the cost of sending

Marguerite to the Central Institute for the Deaf (CID) in St. Louis, Missouri. CID is recognized as one of the leading institutions in the world which teaches deaf children. It emphasizes an oral program which prepares students for entry into mainstream society. When the grant was initially denied in 1978, the parents elected to send Marguerite back to CID for the 1978-79 school year at their own expense.

In determining how to fulfill its duty under G.S. 115-363, et seq. (1977) and 20 U.S.C. 1401, et seq., the school system evaluated Marguerite's needs and, thereafter, determined if the Wilson School System could satisfy her needs. A committee formed to evaluate Marguerite developed an Individualized Education Program (IEP) for Marguerite which provided that she be

placed in a regular sixth grade class with support services.

Being dissatisfied with the recommendation of the committee, the parents appealed the decision. The matter was heard on 11 October 1978 before George S. Willard, Jr., who affirmed the decision of the committee. The parents appealed that decision, and, at a State Review Hearing on 20 December 1978, the decision to place Marguerite in the Wilson School System was again affirmed. The parents then appealed that decision to the Superior Court of Wilson County. Judge Stevens, making findings of fact and conclusions of law, affirmed the administrative decisions to place Marguerite in the public schools. From the adverse decision by the superior court, the plaintiff appeals to this Court.

II

SCOPE OF REVIEW

Our scope of review on this appeal of an administrative agency decision is determined by the "issues presented for review by the appealing party." Utilities Comm. v. Oil Co., 302 N.C. 14, 21, 273 S.E. 2d 232, 236 (1981).

In Savings & Loan League v. Credit Union Comm., 302 N.C. 458, 463-64, 276 S.E. 2d 404, 408-09 (1981), our Supreme Court said:

> Under the APA, a reviewing court's power to affirm the decision of the agency and to remand for further proceedings is not circumscribed. However, the court may reverse or modify only if the substantial

rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions; or

(2) In excess of statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedure; or

(4) Affected by other error of law; or

(5) unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire

record as submitted; or

(6) Arbitrary or capricious.

G.S. §150A-51 (1978).

On this appeal, the plaintiff presents three arguments: (1) that during the assessment, evaluation and placement of Marguerite, the school committee did not comply with due process of the applicable federal and State regulations; (2) that the IEP developed for Marguerite is not responsive to her special needs as required by federal and State statutes and regulations; and (3) that the school system failed to provide the most appropriate education for Marguerite. These arguments therefore present the following issues under G.S. 150A-51: (1) whether the actions of the school system were in violation of consti-

tutional provisions; (2) whether the decision by the school system regarding an appropriate education for Marguerite was affected by error of law; (3) whether the decision was arbitrary and capricious; and (4) whether the decision was supported by substantial evidence.

III

APPROPRIATE EDUCATION

We address first the plaintiff's argument that G.S. 115-363 (1977) and 20 U.S.C. 1401 et seq. require the local school agency to provide a handicapped student with the most appropriate education. We disagree.

G.S. 115-363 (1977) provides that "[t]he policy of the State is to provide a free appropriate publicly supported education to every child with special needs."

The federal statute likewise provides that "[i]t is the purpose of this chapter to assure that all handicapped children have available to them, . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs. . . ." 20 U.S.C. 1400(c) (1982 Cum.Supp.). Title 16 of the North Carolina Administrative Code Chapter 2, subchapter E section 1501(c) provides that a free appropriate public education is special education related services which:

> (1) are provided at public expense, under public supervision and direction without charge;
>
> (2) meet the standards of the state education agency;
>
> (3) are provided in confor-

mity with an individualized education program.

The federal statute defines free appropriate public education as special education and related services which

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State Educational Agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required

> under section 1414(a) (5) of this title.

20 U.S.C. 1401 (18).

While there are no State cases interpreting our State provisions, the United States Supreme Court recently interpreted the federal provision to mean a free appropriate education, not the best or most appropriate education. Board of Education v. Rowley, 50 U.S.L.W. 4925 (28 June 1982). Specifically, with regard to the federal statute the Rowley Court said:

> When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is

required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP,

> and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

50 U.S.L.W. at 4932-33.

Although our statute was designed, in part, to bring the State in conformity with the federal statute, see G.S. 115-363 (1977), the Rowley Court's interpretation of Congress' intent does not control our interpretation of our General Assembly's

intent. We believe that our General Assembly "intended to eliminate the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn if that is reasonably possible." Rowley, 50 USLW 4925, 4936 (White, J., dissenting). Under this standard a handicapped child should be given an opportunity to achieve his full potential commensurate with that given other children. 1/

1/ Chapter 115, under which this action was brought, was rewritten by Session Laws 1981, c 423, s.1, effective 1 July 1981, and has been recodified as Chapter 115C. In Chapter 115C, the General Assembly clearly spelled out its intent by declaring "that the policy of the State is to ensure every child a fair and full opportunity to reach his full potential. . . ." G.S. 115C-106.

Nothing we have said, however, helps the plaintiff on the facts of this case. Our statute, as progressive as it may be, was not designed to require the development of a utopian educational program for handicapped students any more than the public schools are required to provide utopian education programs for non-handicapped students. We believe that the Wilson County School System has fulfilled its obligation to provide Marguerite with a free, appropriate education. We, therefore, hold that the decision was not affected by error of law and overrule this assignment.

IV

DUE PROCESS

Plaintiff argues that she was denied due process of law because she was not provided with a fair tribunal. Specifically,

plaintiff argues that because of the presence and influence of Mildred Blackburn, a consultant for programs for the hearing impaired in the public schools of North Carolina with a preference for mainstreaming hearing impaired students rather than putting them in residential facilities, the conferences held to develop Marguerite's IEP were biased. Plaintiff further alleges that Ms. Blackburn's opinions, because of her position, were viewed as expert opinions and were given too much weight. Alleging that this bias prevented the committee from considering that the CID residential facility was the most appropriate place for her, the plaintiff contends that the rules and regulations under which the IEP were developed were also violated. We disagree.

First, the parties agreed at the hear-

ing on 11 October 1978 that the required due process procedures had been adequately followed prior to and during the hearing. The State Review hearing officer found that all State and federal regulations had been followed in determining the needs of the child. No exception was taken to this finding. Further, the trial court found that the parents had been given notice of the hearings.

Due process requires that an individual receive adequate notice and be given an opportunity to be heard. In re Moore, 289 N.C. 95, 101, 221 S.E. 2d 307, 309 (1976). This requirement applies to administrative agencies performing adjudicatory functions. Goldberg v. Kelly, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970); Thomas v. Ward, 529 F. 2d 916 (4th

Cir. 1975). "A fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136, 99 L. Ed. 942, 946, 75 S.Ct. 623, 625 (1955). We are convinced that the notice requirements of due process were met in both the hearings below and in the adjudication in the superior court. We also find no merit to the plaintiff's claim that the "bias" of Mildred Blackburn resulted in a denial of due process.

The mere fact that a member of the panel which developed the IEP for Marguerite had expressed a certain professional opinion on mainstreaming versus residential placement does not result in a violation of due process. First, it is possible for members of boards or agencies to make policy decisions and later perform

adjudicatory functions as well. "The fact tnat an administrative tribunal acts in the triple capacity of complainant, prosecutor and judge is not violative of the requirements of due process." 73 CJS Public Administrative Bodies and Procedure §60, p. 391 (1951). In Thompson v. Board of Education, 31 N.C. App. 406, 233 S.E. 2d 538 (1976), reversed on other grounds 292 N.C. 406, 233 S.E. 2d 538 (1977), this Court addressed the question of bias on the part of a school board charged both with determining if cause existed for suspension of a teacher and for thereafter determining if the teacher should be dismissed. In finding that no bias or violation of due process existed, the Court relied upon United States Supreme Court cases which addressed the issue of bias and prejudgment on the

part of agency or board members.

In Trade Comm. v. Cement Institute, 333 U.S. 683, 92 L.Ed. 1010, 68 S. Ct. 793 (1948), members of the Commission who had investigated the pricing system of the respondent and suggested that it was illegal were asked to disqualify themselves. The Supreme Court stated that there was no need for them to do so; the fact that the commissioners had formed an opinion as a result of their prior investigation did not mean that they could not later render an objective opinion. 333 U.S. at 702, 92 L. Ed. at 1035, 68 S. Ct. at 804. The court analogized the role of the Commissioners to that of a trial judge. It reasoned that due process would not require a judge to recuse himself simply because he had expressed an opinion on certain types of conduct.

Id. at 702-03, 92 L.Ed. at 1035, 68 S.Ct. at 804. In Hortonville District v. Hortonville Education Assoc., 426 U.S. 482, 49 L.Ed. 2d 1, 96 S. Ct. 2308 (1976), the Supreme Court rejected the claim of bias by discharged striking teachers that the School District could not terminate their employment since the Board had been involved as a negotiator during the teacher strike. The Court stated that the fact that the Board was involved in the collective bargaining process did not "overcome the presumption of honesty and integrity in policymakers with decisionmaking powers," and that this involvement was not "the sort of bias" that had disqualified other dicisionmakers as a matter of federal due process. Id. at 496-97, 49 L. Ed. 2d at 11-12, 96 S. Ct. at 2316.

In the case sub judice, Mildred Blackburn participated on the committee to determine Marguerite's IEP. She expressed views against residential placement for children such as Marguerite. This view was contrary to that presented by Marguerite's mother. Mainstreaming and residential placements were two of the alternatives considered by the committee. First, viewing the record under the whole record test, we find that there is competent, material and substantial evidence to support the decision below. Second, the degree of involvement, prejudgment and predisposition of Mrs. Blackburn was far less assuming than that of the FTC Commissioners in Cement Industries and of the School Board in Hortonville Education Assoc. In view of Cement Industries and Hortonville Education

Assoc., we find that the predisposition or professional theory which Mrs. Blackburn had, and brought to the Committee, was not enough to constitute bias and a violation of due process.

V

COMPLIANCE WITH STATE AND FEDERAL RULES AND REGULATIONS

We have carefully reviewed the record and find that the school system substantially complied with the relevant federal and State rules and regulations in the development of an IEP for Marguerite. Because we so find, we also find no merit to plaintiff's arguments (1) that she was denied due process of the law due to noncompliance with those regulations; (2) that the decision was not supported by substantial evidence under the whole record test; and

(3) that the decision was arbitrary and capricious.

The applicable regulations require that a child for whom special education is provided be identified and evaluated before such services are provided. 16 NCAC 2E.1510. For the hearing impaired student the following screening and evaluation procedures are required:

(a) required screening or evaluation before placement:

(i) education evaluation,

(ii) speech/language evaluation,

(iii) audiological evaluation,

(iv) otological evaluation,

(v) vision screening;

(b) recommended screening or evaluation before placement:

(i) medical screening,

(ii) psycnological evaluation,

(iii) adaptive behavior evaluation,

(iv) opthalmological or optometric evaluation.

16 NCAC 2E.1510(3). After the screening and evaluation has been completed, an IEP must be developed for each child within thirty days of the determination that the child is to receive special educational programs or services. 16 NCAC 2E.1512(g)(3). The IEP is developed by the local educational agency which provides the services to the student. "The entire school-based committee may or may not be involved." 16 NCAC 2E.1512(b). Chapter 16 of the North Carolina administrative Code section 2E.1512(b) provides that the persons charged with developing the IEP must

include a representative of the local educational agency other than the child's teachers, the child's teacher, the parents, and when appropriate, the child. See also 34 C.F.R. 300.344 (1978). However 16 NCAC 2E.1512(b) (7) provides that:

> For a child with special needs who has been evaluated for the first time, the local education agency shall have:
>
> (A) a member of the evaluation team partricipate in the Individualized Education Program meeting, or
>
> (B) a representative of the local education agency, a child's teacher, or some other person present at the meeting who is knowledgeable about the

evaluation procedures used with the child and who is familiar with the results of the evaluation.

[Emphasis added.]

Further, the IEP must include the following goals and objectives:

(1) a statement of the child's present levels of educational performance;

(2) a statement of annual goals;

(3) a statement of short-term instructional objectives;

(4) a statement of specific education and related services to be provided to the child;

(5) a description of the extent to which the child will participate in regular education programs and a description of the program to be provided;

(6) the projected dates for initiation of services and the anticipated duration of services;

(7) objective criteria, evaluation procedures, and schedules for determining, on at least an annual basis, whether the short-term instructional objectives are being achieved.

16 NCAC 2E.1512(c). See also 34 C.F.R. 300.346 (1978).

Upon review of the record in this case, we find that the Wilson School System conducted the required screening and evaluation of Marguerite. The IEP committee consulted the following: Paul Speziale, a psychologist; Ray Lamm, Director of Instruction; Rosalie Wooten, Exceptional-Children Teacher, Annie Dickets, a regular Administrative Committee member; Mildred Blackburn, Consultant for the Hearing-Impaired Child, State Department of Public Instruction; Danny Hutto, Assistant Superintendent; Sandra Simmons, Staff Member at Eastern North Carolina School for the Deaf; Diane Parker, Director of Programs for Exceptional Children; Connie Michels, Coordinator of Programs for Hearing-Impaired, Atlantic Christian College; and Irene Harrell, parent. It is noted that not all of

the persons listed above attended every conference. The IEP Committee consisted of Diane Parker, Martha Wrenn, and Paul Speziale, who consulted Mrs. Harrell.

The conference reports indicate that several alternatives were discussed at meetings held on 11 August, 22 August, and 28 August 1978 before it was determined that Marguerite should be placed in a regular classroom with support services. The records also show that the observation, assessment and testing to determine Marguerite's needs were all done between 27 July 1978 and 17 August 1978; that the IEP was developed as a result of meetings on 22 August and 28 August 1978; and that the committee made its recommendation on 28 August 1978. Further, our review of the IEP reveals that it includes the goals and objec-

tives required by NCAC 2E.1512(c) and 34 C.F.R. 300.346 (1978). It is clear to us that the school system complied with the applicable regulations.

The plaintiff argues that the school system made a decision to mainstream Marguerite and then proceeded to develop an IEP to suit the mainstreaming. That is, what was offered the plaintiff was what the school system could provide, not what the plaintiff needed. This, the plaintiff maintains, was arbitrary and capricious. We find no merit in this argument. The record indicates that an evaluation was performed prior to a determination of what Marguerite's needs were. Based on the evaluation and assessment the committee determined that Marguerite could be served by enrollment in a regular sixth grade class

with support services.

In addition, the decision to place Marguerite in a regular sixth grade classroom is consistent with policies established in federal and State regulations that handicapped children be educated along with the non-handicapped to the extent possible. See 20 U.S.C. §1412 (5) (B); and 16 NCAC 2E.1515(a). This policy has a rational basis to promote a valid state goal; it does not violate due process. Therefore, we do not find this decision to be arbitrary and capricious.

The plaintiff argues that the decision by the school system was erroneous because the school system did not consider Marguerite's records from the CID and because it only used the Peabody Individual Achievement Test. We find no merit in this

argument. First, the hearing officer who affirmed the school committee's decision had before him numerous exhibits offered by the plaintiff. Among those exhibits were Marguerite's report cards from CID, an IEP prepared by the private school, and several publications regarding education of deaf children. In addition, the hearing officer considered, and included in his findings of facts, the reports from the Coordinator of the Hearing Impaired Program at Atlantic Christian College, and from an audiologist at East Carolina University. The hearing officer, after considering that evidence and the evidence presented by the school system, issued a Decision and Rationale, which affirmed the placement determination of the school system.

In addition, the regulations do not

require, as plaintiff suggests, that the records from the CIU, her report cards, and work samples be considered by the committee as it reached its decision. The statutes and regulations require that a multi-disciplinary diagnosis and evaluation be performed by the school system. G.S. 115-375; 16 NCAC 2E.1510. This the school system did. Significantly, the trial court made the following findings of fact to which no exception was made and which are supported by substantial evidence in view of the entire record:

> 5. At a conference on July 27, 1978, including, among others, Dr. W.O. Fields, Superintendent of the school system, and Mrs. Harrell, it was determined that it would

be necessary to evaluate Marguerite to determine if the school system could furnish her with an appropriate educational program.

6. A multi-disciplinary diagnosis and evaluation of Marguerite was made by the respondent. She was assessed in all areas related to her disability. The respondent conducted conferences on August 11, 14, 22 of 1978 with the petitioners and various educational experts. After the conferences had been concluded, an individualized education program was developed

for the child by the School System.

Further, the local hearing officer also made extensive findings of fact which supported the decision to place Marguerite in a regular sixth grade class.

The plaintiff also argues that the IEP is unresponsive to her needs. Specifically, she argues that the IEP was incomplete in that it did not include a statement of the educational services to be provided for the child and a description of the extent to which the child will be in the regular classroom. The IEP states that the percentage of time to be spent in the classroom and with resource persons was "to be determined by child's needs." While a more specific determination of the above require-

ments is desired, it is our opinion that on the facts of this case, the answers were sufficient. We note that this IEP was developed between 22 August and 28 August 1978, and that the initial request for funds was not made until 17 July 1978 for the 1978-79 school year. We believe that the school board acted diligently and in good faith in evaluating Marguerite's needs and developing the IEP within this relatively short period of time. We also note that the trial court found that Marguerite was enrolled in the Wilson School System in September 1980 and that she is progressing with her studies.

For the foregoing reasons, the judgment below is

Affirmed.

Judge HILL concurs.

Judge WELLS concurs in the result.

APPENDIX B

JUDGMENT

No. 500P82
SUPREME COURT OF NORTH CAROLINA

October 7, 1982
J. GREGORY WALLACE, Clerk

Re: Marguerite Owens Harrell, by her parents, Allen W. Harrell and Irene Burk Harrell (Petitioner) v. Wilson County Schools, et al (Respondents)

Upon consideration of the Plaintiffs' notice of appeal from the North Carolina Court of Appeals, filed in this matter pursuant to G.S. 7A-30, and Defendants' motion to dismiss the appeal for lack of Significant Public Interest and upon consideration of Plaintiffs' petition for discretionary review of the decision of the North Carolina Court of Appeals, pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina

Court of Appeals: Defendants' motion to dismiss the appeal is

"Allowed by order of the Court in Conference this the 5th day of October 1982.

s/ Martin, J.
For the Court"

Plaintiffs' petition for discretionary review is

"Denied by order of the Court in Conference this the 5th day of October 1982.

s/ Martin, J.
For the Court"

Therefore, it is considered and adjudged further that plaintiff do pay the sum of Nine and no/100 Dollars ($9.00) and that execution issue therefor.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the

7th day of October 1982.

s/ J. Gregory Wallace
Clerk of the Supreme Court

APPENDIX C

JUDGMENT

79-CVS-155
WILSON COUNTY SUPERIOR COURT

February 27, 1981

Re: Marguerite Owens Harrell, by her parents, Allen W. Harrell and Irene Burk Harrell (Petitioner) v. Wilson County Schools, Dr. W.O. Fields, Jr., Superintendent, and North Carolina Department of Public Instruction, Dr. A. Craig Phillips, Superintendent (Respondents)

PRELIMINARY STATEMENT

This matter was initiated by Allen W. and Irene Burk Harrell (Petitioners), parents of Marguerite Owens Harrell (child), pursuant to N.C.G.S. 115-179.1 and 20 USC §1415. The Petitioners sought to require the Wilson County Board of Education (Respondent) to provide an educational expense grant for their daughter, who is a child with special needs as defined in

G.S. 115-366. The request was denied for that the School System concluded that it could offer an appropriate program. A hearing was requested and was held by George S. Willard, Jr., Hearing Officer, on October 11, 1978. From a determination in favor of the Respondent, issued on November 6, 1978, Petitioners appealed to the State education agency, pursuant to G.S. 115-179.1(b), 16 NCAC 2E. 1517(c), 20 USC §1415(c) and 45 CFR 121a-150(a). The State Review Officer, Lowell Harris, considered the matter at a hearing held December 20, 1978. On January 18, 1979, the decision of the Hearing Officer was upheld. The Petitioners have now requested judicial review of this administrative decision, in accordance with Article 4 of Chapter 150A of the General Statutes.

This matter came on for hearing before the undersigned Judge at the January 12, 1981, Civil Term of Superior Court of Wilson County. Attorneys for petitioners and respondents filed briefs. After hearing oral arguments, the attorneys for the parties herein were directed to submit proposed orders containing appropriate findings of fact.

Unpon the consideration of the record herein, oral arguments and the briefs submitted, the Court makes findings as hereinafter set forth.

FINDINGS OF FACT

1.

Marguerite Owens Harrell (hereinafter Marguerite) was born on December 20, 1964. At all relevant times she has been a legal resident of Wilson County, North Carolina,

and has lived in the area served by Wilson County Schools. Allen W. Harrell and Irene Burk Harrell are Marguerite's parents and they are residents of Wilson County, North Carolina.

2.

Marguerite has a hearing impairment that is rated from moderate to severe. She is a child with special needs entitled to receive a free, appropriate public education under applicable State and Federal statutes dealing with education for the handicapped.

3.

Marguerite had never been enrolled in the Public Schools of Wilson County at the time these proceedings were initiated. She was enrolled at the Central Institute for the Deaf in St. Louis, Missouri. She had

been enrolled there since 1973. Prior to that time, she attended "oral communication" programs, both private and public, located in Durham and Cary, North Carolina. She briefly attended the Eastern North Carolina School for the Deaf in 1972.

4.

On June 14, 1978, Dr. W. O. Fields, Superintendent of the Wilson County Schools, received a letter form Mrs. Harrell requesting forms to be used when requesting funds for the education of Marquerite at the Central Institute for the Deaf for the academic year beginning September, 1978. Mrs. Harrell was furnished appropriate forms and by letter dated July 14, 1978, the application was submitted and was received by the school system on July 17, 1978.

5.

At a conference on July 27, 1978, including, among others, Dr. W. O. Fields, Superintendent of the school system, and Mrs. Harrell, it was determined that it would be necessary to evaluate Marguerite to determine if the school system could furnish her with an appropriate educational program.

6.

A multi-disciplinary diagnosis and evaluation of Marguerite was made by the respondent. She was assessed in all areas related to her disability. The respondent conducted conferences on August 11, 14, 22 of 1978 with the petitioners and various educational experts. After the conferences had been concluded, an individualized education program was developed for the child by

the School System. The program presented by respondent included an oral communication education program in a regular sixth grade class with support services of a speech therapist, a resource teacher, a psychologist and a classroom aide. A phonic ear and its accessories were to be used in Marguerite's program.

7.

On August 28, 1978, the Administrative Review Committee made its findings that an appropriate program could be provided. Marguerite's parents were notified of this decision. (As shown by Page 338 of the Record.)

8.

The School System, after determining that it could offer Marguerite an appropriate program, denied the request for an

educational expense grant. Marguerite was enrolled by her parents at the Central Institute for the Deaf for the 1978-1979 school year.

9.

The parents of Marguerite, after receiving the determination of the respondent and the placement proposed for Marguertie, requested a hearing. The hearing was held on October 11, 1978, with George S. Willard presiding as Hearing Officer.

10.

At the hearing, witnesses who testified other than Mrs. Harrell and Dr. Fields of the Wilson County Schools were: Mrs. Connie Michels, Coordinator for the Hearing Impaired Program at Atlantic Christian College, Wilson, North Carolina; Diane Parker, Director of Programs for Exceptional Child-

ren, Wilson County Schools; Paul Speziale, School Psychologist for Wilson County Schools; Mildred Blackburn, Consultant for the Program for the Hearing Impaired, State Department of Public Instruction; Gloria Ellis, Speech Clinician, Wilson County Schools; Rosalee Wooten, EMR/LD Resource Teacher for Wilson County Schools; Evelyn Bowden, School Nurse and Social Worker at Wilson County Schools; Martha Wrenn, Diagnostic Prescriptive Teacher for the Wilson County Schools.

11.

A summary of the testimony of the witnesses is as follows:

Mrs. Michels stated that she provided a summer speech tutorial program for Marguerite for two hours a week for about twelve weeks. She testfied that there was

not a program in Wilson County to accommodate Marguerite's educational needs and that the program developed for the child by Wilson County was vague and without specific time allotments special instruction and classroom instruction. She also stated that such a program, however, was an ongoing process and one she would have to see in a classroom setting in order to determine the adequacy of the program. She stated that she thought it would be helpful to the child to be at home with her parents rather than attending a residential school such as the one at St. Louis. She gave an opinion, however, that the program at the St. Louis school was superior to the one being developed by Wilson County for Marguerite.

There was entered in the record in behalf of the petitioners Exhibit H-3, being a statement by the audiologist the East Carolina Speech and Hearing Clinic who evaluated Marguerite on June 23, 1978. It was his recommendation that she be returned to St. Louis because, to his knowledge, there were no programs in the State that provided the same type of education found at that school.

Paul Speziale testified as to the results of various tests administered to Marguerite by him. He testified, in his opinion, the program offered by the school system would be appropriate to meet the educational needs of the child and that, in his opinion, his evaluation of her did not reveal any special education needs that the school system could not meet.

Gloria Ellis, Speech Clinician, testified as to the results of various tests administered to Marguerite and said she had little difficulty understanding her speech.

Mrs. Mildred Blackburn testified that she was consultant for Programs for the Hearing Impaired in the public schools of North Carolina and testified as to extensive education with hearing impaired children and extensive experience in teaching same. She testified as to similar children in North Carolina who had been in the same situation as Marguerite who had been returned to public schools and the success that had been had with them. She gave as her opinion that the program that had been developed for Marguerite had all of the components of a program that the State Department would recommend for children who

are hearing impaired.

Rosalee Wooten, EMR/LD HI Resource Teacher for Wilson County Schools, testified that her undergraduate degree was in education of the hearing impaired and that she had worked for the Eastern North Carolina School of the Deaf; that at the present time, she was working on her masters in learning disabilities at East Carolina University. She was of the opinion that Marguerite, with the benefit of a phonic ear, could function in a regular classroom, that Marguerite functioned quite well in a one-to-one situation and that the school was prepared to offer her a one-to-one basis on a daily schedule. She also stated that there was a program in existence in Wilson serving another child with a hearing impairment; that the other child had been

mainstreamed back into a regular classroom and was fitting very well socially an academically and apparently Mrs. Michels was not aware that such a program had already been developed for another child and was working well.

Mrs. Evelyn Bowden, School Nurse-Social Worker, testified that she examined Marguerite as it related to vision screening and that glasses really did not help her.

Mrs. Diane Parker, Director of Programs for Exceptional Children for Wilson County Schools, testified as to her credentials in the area and as to her experience in teaching multi-handicapped children. She stated that she met with Mrs. Michels, Mrs. Harrell, Martha Wrenn, the Diagnostic Prescriptive Teacher, and Mr. Paul

Speziale, the School Psychologist. Mrs. Harrell stated during one of the conferences that she had already arranged for Marguerite to attend the Central Institute for the Deaf for the 1978-79 year before the summer of 1978, and that Mrs. Harrell said that maybe Marguerite could attend the Wilson County program the following year, but that she was unwilling for her to attend Wilson County Schools for the year 1978-79. Regardless of what the final elements of the individual education program were determined to be for Marguerite, the decision by Mrs. Harrell had been made to reject it.

12.

George S. Willard, Jr., the Hearing Officer, issued his findings of fact and conclusions on November 6, 1978, upholding

the determination by the Wilson County Schools that an appropriate individual education program had been developed and offered to Marguerite. From this determination the petitioners appealed to the State Education Agency pursuant to G.S. 115-179.1(b), 16 NCAC 2E. 1517(c), 20 USC Section 1415(c), 45 CFR 121A-510(a).

13.

The appeal was heard by the State Review Officer, Lowell Harris, at a hearing held on December 20, 1978. A transcript of the evidence of that hearing is contained in the record. At the hearing, again oral evidence was adduced and Mr. David Mills, Assistant Director, Division for Exceptional Children, North Carolina State Department of Public Instruction, assisted the hearing officer. Appearing for the Wilson

County Schools were Dr. W. O. Fields, Jr., Superintendent, Mr. Ray Lamm, Director of Instruction, and Mrs. Diane Parker, Director of Programs for Exceptional Children at the Wilson County Schools. Mrs. Allen W. Harrell appeared on her own behalf.

14.

The State Review Officer was of the opinion that the Wilson County Schools could provide Marguerite with a program that was appropriate to meet her special educational needs and that the school system was willing to provide such a program. The decision of the local Hearing Officer, Mr. Willard, was therefore upheld.

15.

The petitioners appealed from the decision of the State Review Officer in accordance with Article IV of Chapter 150A of the

General Statutes.

16.

Marguerite was enrolled in Coon Middle School of the Wilson County Schools on September 2, 1980, for the 1980-81 school term. Her teachers and the specialists working with her report that she is progressing satisfactorily with her studies.

CONCLUSIONS OF LAW

1. The question for the Court to decide is whether Wilson County Schools offered an appropriate program to meet the educational needs of Marguerite Harrell for the 1978-79 school year.

2. P.L. 94-142, now 20 USCA §1401, et seq. and the implementing regulations, 45 CFR §121a.4, define a free, appropriate public education as special education related services which:

(a) Have been provided at public expense, under public supervision and direction, and without charge,

(b) Meet the standards of the State educational agency,

(c) Include an appropriate preschool, elementary or secondary school education in the State involved, and,

(d) Are provided in conformity with the individualized education program.

Similarly, 16 NCAC 2E.1501(c) (promulgated pursuant to the provisions of G.S. 115-365 through 367 and G.S. 115-375) defines free, appropriate public education as special education related services which:

(1) Are provided at public expenses, under public supervision and direction without charge.

(2) Meet the standards of the State education agency.

(3) Are provided in conformity with an individualized education program.

3. It is the duty of a School Board to provide an <u>appropriate</u> program for exceptional children with special needs. The School Board is not required to provide or pay for the best education available at other schools but only to furnish an appropriate education.

4. This Court, in reviewing the decisions heretofore made herein is applying

the "whole record" test as defined in Thompson v Board of Education, 292 NC 406, 233 S.E. 2d 538 (1977). The "whole record" test does not allow this Court to replace the Board's judgment as between two reasonably conflicting views, even though the Court could justifiably have reached a different result had this matter been before it de novo.

5. The "whole record" test fully supports the hearing officer and the State Review Officer's decisions that Wilson County Schools had offered the child an appropriate program and placement. The evidence of the appropriateness of the placement and program was presented by educational professionals trained and qualified to make such decisions.

6. The judiciary should not substitute its judgment for that of educational agencies unless pursuant to G.S. 150A-51 the Court finds that substantial rights of the petitioners have been prejudiced because the administrative findings, inferences and conclusions, or decisions are:

(1) In violation of constitutional provisions; or

(2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedure; or

(4) Affected by other error of law; or

(5) Unsupported by substantial evidence admissible under G.S. 150A-29(a) or

G.S. 150A-30 in view of the entire Record as submitted; or

(6) Arbitrary or capricious.

(Emphasis supplied)

7. The Court finds that there was substantial admissible evidence to support the decisions of the Hearing Officer and the Review Officer.

IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that the decisions of the Hearing Officer and the Review Officer are hereby affirmed and the petition filed in this Court by the petitioners is hereby dismissed.

Signed out of term and out of Wilson County by consent of the parties.

This February 27, 1981.

s/ Henry L. Stevens, III
Judge

APPENDIX D

STATE REVIEW DECISION

Child's Name: Marguerite Owens Harrell

Parents (Appellants): Mr. and Mrs. Allen W. Harrell

Address: 408 Pearson Street, Wilson, N.C.

Local School District (Appellee): Wilson County Schools

Representative: Dr. W.O. Fields, Jr., Superintendent

Review Date: December 20, 1978

Date of Decision: January 28, 1979

Review Officer: Lowell Harris

On Wednesday, December 20, 1978, in the Education Building, Raleigh, N.C., I, Lowell Harris, represented Dr. A. Craig Phillips, State Superintendent of Public Instruction, in a review of the November 7, 1978 decision by Mr. George S. Willard resulting from the October 11, 1978, hearing

regarding an educational program offered by the Wilson County Public Schools for Marguerite Owens Harrell.

Although a transcript of the December 20, 1978 review is not required, I nevertheless provided for the taking of a transcript. I have waited until after reviewing the transcript before making a final decision. A copy of the transcript has been forwarded to both parties under separate cover.

At the December 20, 1978 review, I was assisted by Ms. Patricia Hodulik, Associate Attorney General, Department of Justice, and Mr. David Mills, Assistant Director, Division for Exceptional Children, N.C. State Department of Public Instruction. Appearing for the Wilson County School were Dr. W. O. Fields, Jr., Superintendent,

Wilson Schools, Mr. Ray Lamm, Director of Instruction, Wilson County Schools and Mrs. Diane Parker, Director of Programs for Exceptional Children, Wilson County Schools. The petitioner, Ms. Allen W. Harrell appeared on her behalf.

Mr. and Mrs. Allen W. Harrell requested a review of the decision by the local hearing officer on the question of whether or not the Wilson County Schools can provide an appropriate educational program to meet the special educational needs of Marguerite Owens Harrell. Mr. George S. Willard, the local hearing officer decided that the Wilson County Schools can provide such a program.

PROCEDURE AND TESTIMONIES

I reviewed the transcript of the local hearing of October 11, 1978. At the review

of December 20, 1978 I heard arguments and rebuttals from both the petitioner and the respondent.

The transcript of the local hearing indicates that after the Wilson County Public Schools provided a multidisciplinary evaluation of Marguerite and developed an individualized education program for her, they arrived at a decision which would place Marguerite in a regular sixth grade class with additional support services by resource personnel. Mr. and Mrs. Harrell challenged the placement decision on the grounds that the proposed placement would seriously impair the progress Marguerite has been making. Mrs. Harrell indicated that she was in favor of mainstreaming her daughter as early as possible but at a time that will not interfere with her right to

an appropriate education for herself. She indicated that it was the opinion of the teachers who have worked with her at the Central Institute for the Deaf in St. Louis, Missouri that Marguerite is not ready for mainstreaming. The transcript also indicates that the following were presented and argued by the petitioner and others who represented her at the hearing on October 11, 1978:

1. Mr. Garrett, East Carolina University, who evaluated Marguerite, wrote a letter on July 12, 1978 saying that Marguerite's auditory receptive abilities with the use of amplification was above average for a child with this particular type of hearing loss. He indicated that he felt the excellent expressive and receptive ability was a function of the excellent

program she was attending at Central Institute for the Deaf. He recommended that she return to the institution to complete her educational curricula because he knew of no programs in North Carolina that provided the same type of educational programs like that found at CID.

2. Mr. Dennis Jernigan, headmaster at the Central Institute for the Deaf, wrote a letter saying that he agreed with the person who mentioned that Marguerite might appear to be a good candidate for early mainstreaming. He mentioned that Marguerite has a nice easy flow of speech and can communicate with hearing people but at a superficial level. He mentioned that children like Marguerite often get into the mainstream of education too early and become failures.

3. Ms. Harrell compared the individualized education plan as prepared by the CID with the education plan prepared by the Wilson County Public Schools. She mentioned that the plan for the CID was a detailed report and reflected an awareness of Marguerite's special needs. She stated that she wanted teachers for her daughter who had had professional training and experience in working with handicapped children. She also stated that she did not want to take Marguerite from a proven program (CID) and try something else that might or might not work.

4. Mr. Alexander Paul Speziale, psychologist in the Wilson County Schools, evaluated Marguerite and wrote a psychological report. He acknowledged that communication difficulties were minimal

throughout testing.

5. Ms. Harrell stated that her daughter had had problems in the classroom, especially behavior problems. Ms. Harrell stated that Marguerite's behavior problems were not controlled by medication and that it had not been determined that she needs possible medication to control the behavior problems. She mentioned that Mr. Speziale had reported that the Wechsler Intelligence Scale for children was given to Marguerite and that her present intellectual functioning ranged from the borderline to average ranges. According to Mr. Speziale's report Marguerite appeared not to be achieving up to her general intellectual potential in the areas of reading and spelling.

6. Ms. Harrell stated that she had never presented Marguerite for enrollment

in the Wilson County Schools and requested that an appropriate program be designed for her. She also mentioned that it had not occurred to her that the Wilson County Schools would be an appropriate placement for Marguerite and that she had assumed that the schools could not provide an appropriate program to Marguerite.

7. Ms. Connie Michels, coordinator of the hearing impaired program at Atlantic Christian College, reported that she worked with Marguerite as a speech clinician in May, 1978. She reported that Marguerite is a very, very oral child who used her residual hearing to its utmost. She also mentioned that she is an avid speech reader, but needs a lot more work in speech and language. Ms. Michels felt that the personnel who were to work with deaf or hard

of hearing children should be trained to work with this type of child before putting the child into the program. She also felt that curriculum modifications were needed for a hearing impaired child, as well as additional equipment and an acoustically treated room. Ms. Michels felt it would be a tremendous adjustment for Maryuerite to change programs. She indicated that she did not feel that the Wilson County Schools had established the criteria needed prior to mainstreaming hearing impaired children.

8. Ms. Michels stated that she was opposed to placement of Maryuerite in the Wilson County Schools because preparation of the professional and the non-professional staff members should begin before the child is placed into the program, not while the child is there. She indicated

that an appropriate facility was needed and that the teacher/student ratio should be reduced. She said the she did not feel that Marguerite was ready to be placed into a class of regular sixth graders without necessary preparatory work. She also felt that her speech and language development was not to a point where she can perform and learn in the kind of environment proposed for Marguerite in the Wilson County Schools. Ms. Michels stated that she felt that the home environment is the place for any child and that living at home could make a contribution to her education.

The appellee was asked to present testimony. Key points that were presented included the following:

1. Dr. W.O. Fields, Superintendent, Wilson County Schools, stated his first

contact with this matter was on June 14, 1978, when he received a copy of a letter from Ms. Harrell, mother of Marguerite, requesting funds to provide for the education of Marguerite at the Central Institute for the Deaf in St. Louis.

2. Dr. Fields revealed that Marguerite has never been enrolled in the Wilson County Schools and there was no information to indicate that she had ever been presented for enrollment.

3. A conference was arranged with Ms. Harrell, Marguerite, Mr. Speziale, Psychologist of Wilson County Schools, Mr. Lamm, Director of Instruction, and Mrs. Rosalee Wooten, an EMR/LD teacher who is certified in hearing impaired education and Dr. Fields, Superintendent. This group of individuals decided that further evaluations

would be needed before proper assessment could be completed as to whether they could or could not meet Marguerite's needs.

4. It was pointed out that the school system was presently serving a hearing impaired student who is approximately the same chronological age as is Marguerite.

5. Dr. Fields testified that the Wilson County Schools had accepted the mandate from Public Law 94-142 and N.C. House Bill 824. He indicated that he and his staff had been thorough and conscientious in their effort to respond to the needs of Marguerite. They had spent a great deal of time assessing the educational needs of the child and are developing the individualized education program. He emphasized that he believed the Wilson County Schools had made a placement recommendation which will serve

the educational needs of Marguerite, in an appropriate, least restrictive environment.

6. Ms. Harrell stated that she had never considered the fact that the School System might have a program suitable for Marguerite, but that maybe every handicapped child ought to first approach the public school system.

7. Mr. Lamm, Director of Instuction, Wilson County Schools, testified that Mr. Paul Speziale, psychologist in the Wilson County Schools, gave Marguerite a psychological evaluation on July 31, 1978 and that on August 1, Miss Gloria Ellis, Speech Clinician, gave her a speech/language evaluation. Letters from Doctors Lee Clark and Robert Sloop of the Wilson Clinic were received on August 4, 1978. On August 22, 1978, a meeting was held to discuss an

individualized education program for Marguerite. Mr. Lamm stated that on August 28, 1978, the administrative placement committee made a decision on the placement of Marguerite. The administrative placement committee report, parental permission for placement, the appeals procedure and a copy of the IEP were mailed to Mr. and Mrs. Harrell by certified mail. Mr. Lamm reported that Dr. Fields did not sign the expense grant application because he and his staff felt they could provide an appropriate program for Marguerite in the Wilson County Schools.

8. Mr. Speziale, Psychologist in the Wilson County Schools, testified that he tested Marguerite and that she was very pleasant, cooperative and eager to work. He stated that she spoke freely and intel-

ligibly with him. Communication problems appeared to be minimal throughout the testing. According to the results of the tests, Marguerite's present intellectual functioning ranged from the borderline to average. He speculated that what Marguerite needed was a program in the school system where she could receive increased exposure to a more normal or more normalized academic setting where she might learn to function better in reading and spelling. Mr. Speziale expressed an opinion that he felt strongly that a local setting would be much more conducive to Marguerite's social and emotional development. He stated that he felt Marguerite was ready to enter the Wilson County School System and that the Wilson County Schools are ready to serve her. Mr. Speziale

stated that his evaluation did not reveal any special educational needs that the school system could not meet.

9. Ms. Mildred Blackburn, Consultant in Speech and Hearing, Division for Exceptional Children, North Carolina State Department of Public Instruction, testified that after careful review of Marguerite's tests and academic status, she recommended that Wilson County consider offering services to Marguerite in the local schools, as one possible option. She stated that she felt confident that the personnel of Wilson County were committed to good programming for Marguerite, that they had competencies adequate to provide a quality program, and that the child would greatly benefit from the association with the stimulation by other hearing, speaking peers.

Ms. Blackburn testified that the individualized education program developed for Marguerite had all the components of a program that she would recommend for children who are hearing impaired. She indicated that the program offered to Marguerite met all the legal standards. Ms. Blackburn indicated that personnel in the State Department of Public Instruction would be available to work with the Wilson County Schools. She also indicated that the resource teacher who would be working with Marguerite and the regular class teacher is certified to work with the hearing impaired.

10. Ms. Gloria Ellis, Speech Clinician in the Wilson County schools, testified that she conducted a speech/language evaluation of Marguerite, and recommended

that Marguerite receive speech therapy of a minimum of three times per week.

11. Ms. Rosalee Wooten, EMR/LD resource teacher for the Wilson County Schools, testified that she had an undergraduate degree from Atlantic Christian in education of the hearing impaired. She stated that she had done extensive tutoring and observing at Eastern N.C. School for the Deaf. Ms. Wooten stated that she felt Marguerite could function in the regular classroom with the use of voice amplification mechanisms. Ms. Wooten stated that she would teach Marguerite all the academics and would work with the regular classroom teacher to reinforce what she had taught.

12. Ms. Diane Parker, Director of Programs for Exceptional Children, Wilson

County Schools, testified that she met with the placement committee for two hours on August 22, 1978 and agreed that Marguerite would be placed in sixth grade class, which would use an oral approach. A resource teacher who is certified to work with the hearing impaired, a speech therapist, psychologist, and a teacher aide would work with Marguerite. She also stated that the pupil/teacher ratio in the regular class would be lowered so that Marguerite's needs could be met. It would be determined after the placement how much time Marguerite would spend with the resource teacher. This would depend on the need. Other arrangements would be considered such as special acoustical design and large print books after Marguerite's initial placement.

Ms. Parker stated that on August 28,

1978, the administrative placement committee in the Wilson County Schools met and recommended placement at the Vick School for Marguerite. Ms. Harrell was present at a conference on August 22, 1978 to provide input into the IEP. Ms. Parker stated that Ms. Harrell stated before the IEP was developed that she was already committed to return Marguerite to the school in St. Louis for this year.

FINDINGS AND OBSERVATIONS OF THE REVIEW OFFICER

In the opinion of the review officer:

1. The Wilson County Schools have attempted to offer and have offered to provide a program appropriate to meet the special educational needs of Marguerite Harrell. They have followed the appropriate and required procedures in federal

and state regulations in determining the needs of the child.

2. The Wilson County Schools have offered to continuously evaluate the progress of Marguerite and provide what is needed to assure her success. Additional personnel with be employed if needed.

3. Even though all of the personnel who will be working with Marguerite are not trained to work with the hearing impaired, the resource teacher is certified to work with the hearing impaired.

4. State Department personnel from the Division for Exceptional Children have offered their services to work with the Wilson County Schools in meeting the educational needs of Marguerite.

5. After careful reading of the transcript of the October 11, 1978 hearing, I

feel that the local hearing officer gave sufficient opportunity for all present to argue or add or question anything desired before the hearing was adjourned.

DECISION

After carefully reviewing the transcript of the local hearing and after hearing and considering arguments for both parties, it is my opinion that the Wilson County Schools can provide Marguerite a program that is appropriate to meet her special educational needs. I feel that the Wilson County Schools are willing to provide such a program and that they will not exclude Marguerite from such a program. The decision of the local hearing officer is therefore upheld.

RECOMMENDATIONS

1. It is recommended that the

teachers, aide and other resource personnel work closely with Ms. Harrell during the first few months of school to make sure Marguerite is adjusting to the new school environment and that the necessary adjustments be made to ensure Marguerite's success. Continued review, evaluation and adaptation of Marguerite's program should be maintained.

2. The school system should request assistance from the Division for Exceptional Children, State Department of Public Instruction in providing appropriate staff development and other services to the personnel who will be working with Marguerite.

JUDICIAL REVIEW

Subject to the provisions of N.C.G.S. 150 A, 115-179, 1(b), and 16 N.C.A.C. 2E. 1517d, a petition for judicial review of

this decision may be filed in the Superior Court of Wake County within thirty days after notice of this decision is received.

Sincerely,

s/ LOWELL HARRIS

(Hearing Review Officer for
Dr. A. Craig Phillips,
State Superintendent of
Public Instruction)
Assistant Director,
Policy, Personnel
Development and
Regional Services
North Carolina Department
of Public Instruction

cc: Dr. A. Craig Phillips
Dr. O.E. Fields
Mr. Theodore R. Drain
Mrs. Patricia Hodulik

APPENDIX E

HEARING DECISION

November 6, 1978

Child's name: Marguerite Owens Harrell

Parents (Appellants): Mr. and Mrs. Allen W. Harrell

Address: 408 Pearson Street, Wilson, N.C.

Local School District (Appellee): Wilson County Schools

Representative: Dr. W.O. Fields, Jr., Superintendent

Hearing Date: October 11, 1978

Date of Decision: November 6, 1978

Hearing Officer: George S. Willard, Jr.

ISSUE AND PURPOSE OF THE HEARING

The issue in this hearing is related to the appropriateness of the educational program proposed for the child in question. The appellants, the parents of the child, contend that to place the child in a

regular classroom with the support services indicated in the Individualized Education Program (IEP) prepared by the school system would seriously impair the progress the child has been making to overcome her handicap in a proven program of oral education specifically designed to meet the needs of hearing impaired children. The school system, the appellee, contends that the proposed program of oral education which would include the use of amplification equipment in a regular classroom setting, with the addition of the indicated supportive services, would be appropriate to serve the special needs of the child within the least restrictive environment.

WRITTEN EVIDENCE

The following documents were entered as evidence:

Letter from Parents (Appellants)	(H-1)
Letter from Coordinator, Hearing Impaired Program	(H-2)
Letter from ECU Audiologist	(H-3)
Letter from Headmaster of Private School	(H-4)
Report Cards from Private School	(H-5)
IEPs Prepared by Private School	(H-6)
IEP Prepared by School System	(H-7)
Letter to Governor	(H-8)
Two Letters from Child to Parent	(H-9)
Guide for Parents	(H-10)
Reading Achievement of the Deaf	(H-11)
Profiles of Former Students of Private School	(H-12)
Acoustical Design of Classroom for the Deaf	(H-13)
Has Oral Education Succeeded?	(H-14)
Speech and Language Evaluation	(H-15)
School System's Psychological Report	(H-16)

Volta Review (September, 1977)	(H-17)
Letter from Parent (Appellant)	(S-1)
Letter from Superintendent of School System	(S-2)
Request for Education Grant	(S-3)
Report of Parent-Child Conference	(S-4)
School System's Psychological Report	(S-5)
Speech and Language Evaluation	(S-6)
Letters to Parents Concerning Child's Vision	(S-7)
Letters from Ophthalomologists	(S-8)
Conference Report (August 11, 1978)	(S-9)
Conference Report (August 14, 1978)	(S-10)
Conference Report (August 22, 1978)	(S-11)
Procedures for Referral, Screening, Assessment and Placement	(S-12)
Memorandum Regarding Expense Grant Application	(S-14)

DUE PROCESS

Prior to the hearing, a determination was made by the Hearing Officer that the

school system had complied with all aspects of the required procedural safeguards. In addition, the full disclosure requirement was met by the exchange of written evidence and lists of witnesses at least five days prior to the hearing. At the close of the hearing, the appellant and the appellee stipulated for the record that the required due process procedures had been adequately followed prior to and during the hearing.

The appellant was not represented by legal counsel. An attorney for the appellee was present but did not participate in the hearing.

FINDINGS OF FACT

1. The child, age 13, has a severe hearing impairment. The results of an audiological evaluation at the East Carolina University Speech and Hearing Clinic

indicate a moderate to profound bilateral sensorineural hearing loss. (Exhibit H-3)

2. The Superintendent of the school system testified that he was first contacted by letter from the appellant on June 14, 1978 requesting forms on which to request an expense grant for the education of the child in a private school. He testified further that the child had never been enrolled in the school system.

3. The child has been enrolled in an out-of-state oral school for the deaf children since 1973 and has made progress satisfactory to the parents. A "Report to Parents" dated May, 1978 indicates: (Exhibit H-5)

> a. Good use of receptive language skills including excellent lip-reading abili y,

excellent use of auditory ability, and excellent understanding of simple sentences and compound sentences when vocabulary and language are familiar.

b. Child is often careless with her oral language and shows little effort to improve these problems.

c. Child is only interested in her ideas and shows little concern about her written language.

d. Child's pronunciation skills are poor but are improving.

e. Child is able to do well

in arithmetic when she puts forth the effort. At times is inattentive.

f. Child's work in reading is acceptable some of the time. She is showing improvement.

g. Child's work in science is very good most of the time. She is inattentive at times in class, and her written work is carelessly done.

h. In spelling, the child performs acceptably some of the time. Her errors are due to carelessness.

i. Child needs more practice in cursive writing.

j. Child enjoys drawing and

painting assignments of all kinds.

k. In physical education, the child rates very good most of the time.

l. Child's behavior with her peers and adults is sometimes inappropriate. She is easily angered.

m. In the area of mental attitude, the child is an active classroom participant.

n. Child is still immature, and this affects progress, since application of learned skills is dependent upon maturity.

4. The Headmaster of the oral school

for deaf children indicates that the child is well-placed, progressing steadily, and should continue in the school for two more years following the current school year. He states that if the child works hard during that time she should be ready for some kind of a mainstreaming program. (Exhibit H-4)

5. Information from the oral school attended by the child indicates that children attend the school for varying lengths of time before they are integrated into educational programs with hearing students. (Exhibit H-12)

6. The audiologist at the East Carolina Speech and Hearing Clinic who evaluated the child on June 23, 1978 expresses the opinion that the child should continue in an oral environment. He also recommends

that she return to the special school to complete her educational curriculum, because to his knowledge there are no programs in the state of North Carolina that provide the same type of educational paradigm like that found at the school. He states further that test results indicate the child's "auditory receptive abilities with the use of amplication are above average for a child with this type of hearing loss." (Exhibit H-3)

7. The Coordinator of the Hearing Impaired Program at Atlantic Christian College, who provided a summer speech tutorial program for the child (2 hours per week for about 12 weeks) attributes the good progress of the child to the excellent oral instruction she has received at the special school. The coordinator expresses the

opinion that any deviation from the child's present placement would be detrimental to her education. She states that there is not a program in Wilson to accomodate the child's educational needs. (Exhibit H-2)

8. In testimony, the Coordinator of the ACC Hearing Impaired Program expressed the opinion that preparation of professional and non-professional staff memebers should begin before the child enters a regular public school neighborhood program, not while the child is there. She testified concerning the IEP developed for the child by the school system that it was vague and without specific time allotments for special instruction and classroom instruction.

9. Under cross-examination, the ACC Coordinator acknowledged that the develop-

ment of an IEP was an ongoing process and that the school system's lack of contact with the child, and without seeing her in a classroom setting, would make a difference. She also expressed the opinion that a judgment of when the child should be mainstreamed should be left to the experts who work with her day in and day out.

10. The appellant testified that the law gives parents the right and responsibility to be actively involved in the planning and implementation of their child's education.

11. The appellant prefers an oral communication program for the child instead of a program of total communication.

12. The appellant quoted from the September, 1977 issue of Volta Review: "The least restrictive environment is always

relative to the needs of a particular child."

13. In testimony, the appellant questioned the advisability of placing a child who is thirteen, almost fourteen, into a class of sixth graders, because the child would strongly object to going to school "with those babies."

14. The school system conducted a multi-disciplinary diagnosis and evaluation of the child. The child was assessed in all areas related to her disability.

a. The school psychologist employed by the school system administered the following tests: Wechsler Intelligence Scale for Children Revised (WISC-R), Developmental Test of Visual-Motor Integration

(DTVMI), Peabody Individual Achievement Test (PIAT), and Peabody Picture Vocabulary Test (PPVT). (Exhibit S-5)

(1) The child's performance on the WISC-R Full Scale I.Q.=81, Verbal I.Q.=72 (73), Performance I.Q.=93. Present intellectual functioning ranges from the Borderline to Average ranges. Child learns more readily through the visual-motor mode rather than the auditory. Relatively underdeveloped areas include both receptive and expressive language skills as well as certain speech sounds. The

child's subtest profile, with the exception of vocabulary subtest, is not unlike that of the typical student with specific learning disabilities.

(2) The child's performance on the DTVMI indicates her visual-motor integration skills are about five years below her chronological age--probably due in part to her hearing handicap.

(3) The child's performance on the PPVT indicates her receptive language skills are significantly limited for her age.

(4) The child's grade equi-

valent scores on the PIAT are as follows: Mathematics - 6.0; Reading Recognition - 3.9; Reading Comprehension - 3.1; Spelling - 4.6; General Information - 5.6; Total Test - 4.5. The child's reading and spelling skills are significantly below expected levels.

(5) The school psychologist gave testimony that the program offered by the school system would be appropriate to meet the educational needs of the child. He testified under direct examination that in his opinion his evaluation did not

reveal any special education needs that the school system could not meet.

b. The speech clinician employed by the school system administered the Goldman-Fristoe Test of Articulation (GFTA) and the Northwestern Syntax Screening Test (NSST). (Exhibit S-6)

(1) The child's percentile rank of the GFTA was below zero percent. Test designed for those with normal hearing. Errors are those characteristic of child's hearing impairment.

(2) Child gave rapid, reli-

able responses during administration of the NSST. Some language delay noted with possessives, pronoun agreement, prepositional phrases, and indirect objects. Some confusion with interrogative sentences beginning with "Is". Errors noted in omitting word endings. Phonemic errors in reading included (k, d, s, z, l, st, ts). Using recorded sample, three auditors indentified correctly 3 out of 5 of child's sentences. Clinician had little difficulty understanding the child's speech.

c. With parents' permission,

copies of four letters relating to the child's visual problems were reviewed by the school system. Child's best corrected visual acuity is 20/25 in the right eye and 20/200 in the left eye. (Exhibit S-7)

d. Child was examined by an ophthalmologist in August, 1973. Diagnosed cause of decreased vision thought to be pigmentation of retina associated with rubella syndrone. An examination on December 20, 1974 by another ophthalmologist indicated best corrected vision to be 20/25 in

the right eye and 20/200 in the left eye. (Exhibit S-8)

e. The school system's nurse-social worker testified that she measured the child's vision as follows: 20/30 in her right eye and 20/200 in her left eye.

15. The school system conducted conferences (August 11, 14, 22, 1978) to discuss further the child's case and to receive input for the development of an individualized education program for the child. Involved in the conferences were the Director of Programs for Exceptional Children, the Director of Instruction, the school psychologist, a teacher of exceptional children, a diagnostic-prescriptive

teacher (all employed by the school system); the mother of the child; the Coordinator of the Program for Hearing Impaired, Atlantic Christian College; a Consultant for Programs for Hearing-Impaired, State Department of Public Instruction; the Assistant Superintendent of the Eastern North Carolina School for the Deaf and a staff member of ENCSD. (Exhibits S-9, S-10, S-11)

16. The school system developed an individualized education program for the child. (Exhibit S-12)

a. A summary of present levels of performance, long-range goals, short-term objectives, criteria for evaluation, and placement decisions were included in the IEP.

b. The percentage of time to be spent

by the child with the regular teacher, speech therapist, resource teacher, and psychologist to be determined by the child's needs subsequent to enrollment in the school system.

17. Placement decision of the school system: (Exhibit S-12) An oral communication education program in a regular 6th grade class with support services of speech therapist, resource teacher, psychologist, and classroom aide. A phonic ear and its accessories would be used in the child's program.

18. The resource teachers and/or special education teachers proposed for the child's program are certified in their professional areas by the state education agency.

19. The testimony of the State

Department of Public Instruction Consultant for Programs for the Hearing Impaired in the public schools of North Carolina included in part the following statements:

a. During the last two years, the number of public school programs for the hearing impaired in the state has increased from eighteen to forty-six programs.

b. We mainstream hearing impaired children only to the degree that they are ready. If it's one hour a day, if it's four hours a day, if it's three hours a day. And not into a total classroom situation.

c. A resource teacher is needed to give services on a one-to-one basis.

d. An aide, if needed, should be there to accompany this child.

e. Speech therapy would be necessary.

f. Amplification should be made available to this child.

g. Support services are needed for the child from the psychologist, ancillary personnel, art and music teachers, etc.

h. The law requires that, to the maximum extent appropriate, handicapped children are educated with children who are not handicapped. "I feel, of course--again, an opinion, but very strongly--that a century of confinement of children in all types of residential centers has only emphasized the trauma of adjustment necessary when the child returns to his own community."

i. The quality of the staff now serving North Carolina's public school hearing impaired pupils is very good.

20. Under cross-examination, the SDPI consultant testified:

a. There are children who would, and need to be, served in a residential center, if they are in that state of multiple impairment. But if there's any hope at all for that child to be anything like normal, then I think he needs to be at home where he learns normal living.

b. My experience, having been in residential centers and having worked with them almost daily is that the opinion of people in those centers is limited. How many of them have really experienced in a public school setting what that can do for a child, as opposed to what can be done in a residential center?

c. The program of special education and related services proposed for the child has all of the components of a program that we would recommend for children who are

hearing impaired. In that sense, it meets the standards of the State Department of Public Instruction.

d. The best schools in the nation for hearing impaired or anything else have to have some access to the child before they can get specific with his goals and objectives.

e. Personnel of the State Department of Public Instruction would be available to work with the school system very early upon request.

21. The EMR/LD resource teacher for the school system, who holds an undergraduate degree in education of the hearing impaired, testified that the child's oral skills are very keen, that she is an avid speech reader, and that in her opinion the child could function in a regular classroom

with the use of voice amplification mechanisms. She testified further that an oral environment would be provided for the child and that she would be taught for a part of each day on a one-to-one basis.

22. The Director of Programs for Exceptional Children for the school system testified that the placement of the child in question would involve a totally oral approach; the resource services from a teacher of the hearing impaired, speech therapist, psychologist, and teacher aide; and one-to-one instruction in a regular classroom setting. The director testified further that the percentage of time to be spent in the support services would be determined by the child's individual needs.

23. Under cross-examination, the director acknowledged that the child's

teacher, except for her resource teacher, would be someone not trained to teach hearing impaired children.

24. The Superintendent of the school system stated that with ability grouping in the schools, if the child were placed in sixth grade or wherever, there would be children achieving at her levels, and she would not be estranged to the instructional program being offered for some children at that grade level.

25. The Superintendent of the school system testified that the school system is presently serving a hearing impaired student who is approximately the same chronological age as the child in question. The program includes a phonic ear for voice amplification.

26. Classrooms for the deaf should be

"over designed" acoustically. (Exhibit H-13)

DECISION AND RATIONALE

The central issue before the Hearing Officer in this case is whether or not free appropriate public education is available in the school system to meet the individual educational needs of the child in question as required by state and federal laws. The adequacy of the educational program offered by the oral school for the deaf children where the child is now enrolled is not an issue before the Hearing Officer, and therefore, is not addressed in this decision.

In his letter indicating that the child should continue her program at the oral school for deaf children for "two more years following this one," the Headmaster of the school makes no reference to the

appropriateness of the educational program offered by the public school system.

Although the ECU audiologist is unaware of programs in North Carolina that "provide the same type of educational paradigm" as that found in the private school attended by the child, the SDPI consultant for programs for the hearing impaired children testifies there are now forty-six public school programs for the hearing impaired in the state. The audiologist makes no reference to the appropriateness of the oral education program offered to the child by the school system.

The Coordinator of the ACC Hearing Impaired Program testified that her major reason for questioning the placement of the child in the school system would be that the preparation of the professional and

non-professional staff members should begin before the child is placed into the program, not while the child is there. This condition would be highly desirable, but it probably would not be reasonaole to expect the school system to make full preparation to serve a child with special needs who might or might not enroll for the 1978-79 school term.

The evidence and testimony presented at the hearing indicate that the school system has complied with the provisions of North Carolina House Bill 824, Public Law 94-142, and Section 504 of the Rehabilitation Act of 1973 by conducting a multidisciplinary diagnosis and evaluation, by developing an idividualized education program, and by offering the child in question a free appropriate public education within

the least restrictive environment. Therefore, it is the decision of the Hearing Officer that the placement determination made by the school system for the child is in compliance with state and federal laws and is appropriate for her.

If the child is presented for placement in the program proposed by the school system for the 1978-79 school term, the child's individualized education program within 30 days shall be developed further with the addition of specific short-term objectives; and the classroom within which the child is placed shall be of an acoustical design approved by appropriate personnel in the State Department of Public Instruction. Although the proposed grade placement appears to be appropriate for the child, if a problem should arise during the

1978-79 school term which seems to be attributable to grade placement, the school system, in consultation with the appellant, shall consider making an adjustment.

Any appeal of this decision by either party to Dr. A. Craig Phillips, State Superintendent of Public Instruction, Raleigh, N.C., must occur within 30 days after the decision of the Hearing Officer is received.

s/ GEORGE S. WILLARD

HEARING OFFICER

APPENDIX F

STATUTORY AUTHORITIES

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APPENDIX F

STATUTORY AUTHORITIES

20 U.S.C. §1400(c)

Purpose. It is the purpose of this Act to assure that all handicapped children have available to them, within the time periods specified in section 612(2)(B), a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

20 U.S.C. §1401(16)

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

20 U.S.C. §1401(18)

(18) The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individual-

ized education program required under section 614(a)(5).

20 U.S.C. §1401(19)

(19) The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a state-

ment of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. §1412(1)

In order to qualify for assistance under this part in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public educa-

tion.

20 U.S.C. §1412(5)(B)

In order to qualify for assistance under this part in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

(5)(B) The State has established... (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services can-

not be achieved satisfactorily, and....

20 U.S.C. §1412(5)(C)

In order to qualify for assistance under this part in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

(5)(C) The State has established... (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate

educational program for a child.

20 U.S.C. §1412(6)

In order to qualify for assistance under this part in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

(6) The State educational agency shall be responsible for assuring that the requirements of this part are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency.

20 U.S.C. §1413(a)(3)

(a) Requisite features. Any State meeting the eligibility requirements set forth in section 612 and desiring to participate in the program under this part shall submit to the Commissioner, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as he deems necessary. Each such plan shall...

(3) set forth, consistent with the purposes of this Act, a description of programs and procedures for (A) the development and implementation of a comprehensive system of personnel development which shall include the inservice training of general and special educational instructional and support personnel, detailed procedures to assure that all personnel necessary to

carry out the purposes of this Act are appropriately and adequately prepared and trained, and effective procedures for acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and (B) adopting, where appropriate, promising educational practices and materials development through such projects;....

20 U.S.C. §1415(e)(2)

(e) Civil action; jurisdiction...

(2) Any party agrieved by the findings and decision made under subsection (b) who does not have the right to an appeal under subsection (c), and any party aggrieved by the findings and decision under subsection (c), shall have the right to bring a civil

action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C. §1415(e)(3)

(e) Civil action; jurisdiction...

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree,

tne child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

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FEDERAL REGULATIONS

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APPENDIX G

FEDERAL REGULATIONS

34 C.F.R. 300.340

DEFINITION

As used in this part, the term "individualized education program" means a written statement for a handicapped child that is developed and implemented in accordance with §§300.341-300.349.

34 C.F.R. 300.346

CONTENT OF INDIVIDUALIZED EDUCATION PROGRAM

The individualized education program for each child must include:

(a) A statement of the child's present levels of educational performance;

(b) A statement of annual goals, including short term

instructional objectives;

(c) A statement of the specific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs;

(d) The projected dates for initiation of services and the anticipated duration of the services; and

(e) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are

being achieved.

34 C.F.R. 300.531

PREPLACEMENT EVALUATION

Before any action is taken with respect to the initial placement of a handicapped child in a special education program, a full and individual evaluation of the child's educational needs must be conducted in accordance with the requirements of §300.532.

34 C.F.R. 300.532

EVALUATION PROCEDURES

State and local educational agencies shall insure, at a minimum, that;

(a) Tests and other evaluation materials:

(1) Are provided and administered in the child's native

language or other mode of communication, unless it is clearly not feasible to do so;

(2) Have been validated for the specific purpose for which they are used; and

(3) Are administered by trained personnel in conformance with the instructions provided by their producer;

(b) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient;

(c) Tests are selected and

administered so as best to ensure that when a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (except where those skills are the factors which the test purports to measure);

(d) No single procedure is used as the sole criterion for determining an appropriate

educational program for a child; and

(e) The evaluation is made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability.

(f) The child is assessed in all areas related to the suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

34 C.F.R. 300.533

PLACEMENT PROCEDURES

(a) In interpreting evaluation data and in making placement decisions, each public agency shall:

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical conditon, social or cultural background, and adaptive behavior;

(2) Insure that information obtained from all of these sources is documented and carefully considered;

(3) Insure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(4) Insure that the placement decison

is made in conformity with the least restrictive enviroment rules in §§300.550-300.554.

(b) If a determination is made that a child is handicapped and needs special education and related services, an individualized education program must be developed for the child in accordance with §§ 300.340-300.349 of Subpart C.

34 C.F.R. 300.551

CONTINUUM OF ALTERNATIVE PLACEMENTS

(a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.

(b) The continuum required under paragraph (a) of this section must:

(1) Include the alternative place-

ments listed in the definition of special education under §300.13 of Subpart A (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

34 C.F.R. 300.552

PLACEMENTS

Each public agency shall insure that:

(a) Each handicapped child's educational placement: (1) Is determined at least annually,

(2) Is based on his or her individualized education

program, and

(3) Is as close as possible to the child's home;

(b) The various alternative placements included under §300.551 are available to the extent necessary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least

restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

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NO. 82-1111

IN THE

Supreme Court of the United States

October Term 1982

Marguerite Owens Harrell, by her Parents,
Allen W. Harrell and Irene Burk Harrell,
Petitioner,

v.

Wilson County Schools, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RUFUS L. EDMISTEN
Attorney General of
North Carolina

ELIZABETH C. BUNTING
Assistant Attorney General

KAYE R. WEBB
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602
Telephone: (919) 733-7387

Z. Hardy Rose
Rose, Jones, Rand & Orcutt, P.A.
P.O. Drawer 2367
Wilson, North Carolina 27893
Telephone: (919) 291-3848

ATTORNEYS FOR RESPONDENTS

DiCesare and Associates Printing • Washington, D.C. • (202) 331-8101

QUESTIONS PRESENTED

I. WHETHER ASSESSMENT, EVALUATION AND PLACEMENT PROCEDURES COMPLY WITH DUE PROCESS AND THE REQUIREMENTS OF THE EDUCATION OF THE HANDICAPPED ACT AND ITS FEDERAL REGULATIONS WHERE THE EVALUATION FORMS WERE ONLY PARTIALLY COMPLETED, INFORMATION WAS NOT OBTAINED WITH REGARD TO PRIOR EDUCATIONAL BACKGROUND OR FROM FORMER TEACHER, A CONTINUUM OF ALTERNATIVE PLACEMENTS WAS NOT CONSIDERED AND A BIASED STATE CONSULTANT WAS UTILIZED.

II. WHETHER AN INDIVIDUALIZED EDUCATION PROGRAM IS RESPONSIVE TO THE SPECIAL EDUCATIONAL NEEDS OF A HEARING IMPAIRED CHILD AS REQUIRED BY THE EDUCATION OF THE HANDICAPPED ACT AND ITS FEDERAL REGULATIONS WHERE THE STATEMENT OF EDUCATIONAL PERFORMANCE RELIED SOLELY ON THE TEST SCORE OF THE PEABODY INDIVIDUAL ACHIEVEMENT TEST, THE PERCENTAGE OF TIME SPENT IN THE REGULAR CLASSROOM AND WITH SUPPORT SERVICES WAS YET TO BE DETERMINED AND ONLY ONE OF THE SPECIAL SERVICES PROVIDERS HAD BEEN TRAINED TO WORK WITH HEARING IMPAIRED CHILDREN.

III. WHETHER A LOCAL SCHOOL SYSTEM COULD PROVIDE AN EDUCATIONAL PROGRAM WHICH WAS "APPROPRIATE" TO MEET THE SPECIAL EDUCATIONAL NEEDS OF A HEARING IMPAIRED CHILD PURSUANT TO THE EDUCATION OF THE HANDICAPPED ACT AND ITS FEDERAL REGULATIONS WHERE THE EVALUATION AND PLACEMENT PROCEDURES AND INDIVIDUALIZED EDUCATION PROGRAM DEVELOPMENT WERE MADE UPON UNLAWFUL PROCEDURES AND THE REGULAR CLASSROOM TEACHER AND ALL BUT ONE OF HER SPECIAL SERVICE PROVIDERS WERE NOT CERTIFIED TO TEACH CHILDREN WITH HEARING IMPAIRMENTS.

PARTIES

The parties to the proceedings in this action are Petitioner Marguerite Owens Harrell, by her parents Allen W. Harrell and Irene Burk Harrell, a child with special needs who seeks to have the Judgment of the lower courts reversed and Respondents Wilson County Schools, Dr. W.O. Fields, Jr., Superintendent and North Carolina Department of Public Instruction, Dr. A. Craig Phillips, Superintendent.

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The judgment of the North Carolina Supreme Court is unpublished and is reproduced as Appendix B to Petitioner's Petition for Writ of Certiorari.

The opinion of the North Carolina Court of Appeals is reported at 58 N.C. App. 260, 293 S.E. 2d 687 (1982) and is reproduced as Appendix A of the Petition.

The judgment of the Wilson County Superior Court is unpublished and is reproduced as Appendix C of the Petition.

The decision of the State Review Officer is reproduced as Appendix D of the Petition. The decision of the Hearing Officer is reproduced as Appendix E of the Petition.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitution of the United States:

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within any jurisdiction the equal protection of the laws.

United States Code:

20 U.S.C. §1401, ***et seq.***

The pertinent text is reproduced as Appendix F to the Petition.

Code of Federal Regulations:

34 C.F.R. Part 300, ***et seq.***

The pertinent text is reproduced as Appendix G to the Petition.

STATEMENT OF THE CASE

Petitioner, Marguerite Harrell, was born 30 December 1964. At all times relevant to the pendency of this action she has been a legal resident of Wilson County, North Carolina. Her parents, Allen W. Harrell and Irene Burk Harrell, have also been residents of Wilson County, North Carolina, during that period. This child is hearing impaired. As such, she is a child with special needs entitled to receive a free

appropriate "public education under applicable federal and state statutes dealing with educational requirements for the handicapped." 20 U.S.C. § 1401, *et seq.*, N.C.G.S. 115-363 *et seq.*

At the time these proceedings were initiated, the child had never been enrolled in respondent school system. From 1973 until the time these proceedings were begun she was enrolled at the Central Institute for the Deaf (hereinafter CID) in St. Louis, Missouri. CID is a residential school which utilizes the "oral communication" method of teaching deaf students. The oral communication method does not involve finger spelling or sign language but it relies on speech reading and other receptive and expressive language skills. Prior to her enrollment at CID, petitioner attended "oral communication" programs both public and private, located in Durham and Cary, North Carolina. Petitioner briefly attended the Eastern North Carolina School for the Deaf in Wilson, North Carolina in 1972. The Eastern North Carolina School for the Deaf employs the "total communication" method of teaching. That method utilizes a combination of finger spelling, sign language, and an oral auditory approach. That method is inconsistent with the "oral" training the child has received.

On 17 July 1978 petitioner applied to respondent for an educational expense grant to procure funds to send the child to CID for the 1978-79 school year beginning in September 1978. (Exhibit S-13)

Respondent conducted a multi-disciplinary evaluation and diagnosis of the child to determine what was necessary to furnish her with an appropriate educational program. She was assessed in all areas related to her disability. Respondent conducted conferences on 11, 14, and 22 August 1978 with regard to the issue of the child's needs. Petitioner's parents and various educational experts participated in these conferences.

Thereafter, respondent developed an individualized education program (hereinafter IEP) for the child. This IEP included an "oral communication" education program in a regular sixth grade class with support services of speech therapist, resource teacher, psychologist, and classroom aide. The use of a phonic ear and its accessories were also proposed for use in the child's IEP.

Respondent found that an appropriate program could be provided for the child locally in the Wilson County schools. Therefore, it denied petitioners' request for an educational expense grant. Despite this determination, the child attended CID during the 1978-79 school year.

Respondent did not initiate or approve of the placement of the child at CID. Respondent was at all times willing to provide the child a free and appropriate education. Respondent prepared an IEP for the child which was never implemented because the child was never enrolled in the Wilson County schools but returned to CID.

In September 1978 petitioner initiated proceedings under the due process provisions of the federal and state statutes governing the education of the handicapped. 20 U.S.C. §1415; N.C.G.S. 115-179.1. Petitioner contended that respondent had not offered the child an appropriate education, but that CID was the appropriate placement for her. Therefore, she argued, respondent had wrongfully denied the application for an educational expense grant. At petitioners' request, a hearing with regard to this matter was conducted at the local level on 11 October 1978 before Mr. George S. Willard, hearing officer. On 6 November 1978 the hearing officer issued his hearing decision in which he concluded that an appropriate educational program had been developed and offered to the child by resondent in compliance with federal and state laws. (R.p. 101)

Subsequently, petitioner appealed from the local hearing officer to the State Education Agency pursuant to

N.C.G.S. 115-179.1(b) and 20 U.S.C. §1415(c). This appeal was heard by State Review Officer Lowell Harris on 20 December 1978. Following this hearing Mr. Harris issued a state review decision in which he upheld the decision of the local hearing officer. (R.p. 124) He stated his opinion that respondent could and was willing to provide the child with a program that was appropriate to meet her special educational needs. (R.p. 132)

Petitioner appealed the decision of the State Review Officer to the Wilson County Superior Court in accordance with N.C.G.S., Chapter 150A, Article 4. Judgment was entered on 2 March 1981 upholding the decision of the State Review Officer.

Petitioner filed notice of appeal from the Wilson County Superior Court to the North Carolina Court of Appeals on 9 March 1981. On 20 July 1982, the North Carolina Court of Appeals affirmed the decision of the Superior Court.

From the decision of the Court of Appeals the petitioner filed notice of appeal and petition for discretionary review in the North Carolina Supreme Court. Further review was denied by that Court on 7 October 1982. This Petition followed.

Subsequent to the initiation of these proceedings, the child was enrolled in respondent school system on 2 September 1980. She has been in regular attendance in respondent school system since that date and has functioned well.

REASONS FOR DENYING THE WRIT

The respondents urge the Court to deny the Petition for the reasons hereinafter set forth.

I. DUE PROCESS CLAIM

The petitioner contends that during the assessment, evaluation and placement of the child, the school system did not comply with due process of the applicable federal and State regulations, thereby denying petitioner a free appropriate public education as required by law. Respondents strongly urge you to dismiss this claim.

This Court has addressed the requirements which must be met by states to comply with the Education for All Handicapped Children Act, (hereinafter Act) 20 U.S.C. §1401 *et seq.*, in the case of *Board of Education v. Rowley*, ____ U.S. ____, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982). The *Rowley* Court set forth the issues which must be considered by a court reviewing the state administrative findings and decisions in a civil action pursuant to 20 U.S.C. §1415(e) (2). A review of the record and the previous decisions in the case *sub judice* clearly shows that the guidelines for review have been followed and the petitioner is not entitled to any further relief.

In *Rowley* the Court directed that judicial review of administrative actions is limited to two questions.

> "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." 73 L. Ed. 2d at 712.

The answer to both of these questions is yes. The State complied with the procedural requirements of the Act and the IEP was reasonably calculated to enable the child to receive educational benefits.

In order to qualify for assistance under the Act, a State must demonstrate that it "has in effect a policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. § 1412(1). The "free appropriate public education" required by the Act is tailored to the unique needs of the handicapped child by means of an "individualized educational program" (IEP). 20 U.S.C. § 1401 (18). The IEP is prepared at a meeting between qualified representatives of the local educational agency, the child's teacher, the child's parents or guardian, and, where appropriate, the child. 20 U.S.C. § 1401 (19). The IEP is a written document containing:

> "(A) a statement of the present levels of educational performance of the child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such service, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved." 20 U.S.C. § 1401 (19).

A "free appropriate public education" is defined by the Act as

> "special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C)

include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with their individualized education program required under Section 614 (a) (5)." 20 U.S.C. § 1401 (18).

North Carolina has in place a policy that assures all handicapped children the right to a "free appropriate public education." N.C.G.S. 115C-106.[1] The IEP prepared for

[1] §115C-106. *Policy.*

(a) The General Assembly of North Carolina hereby declares that the policy of the State is to ensure every child a fair and full opportunity to reach his full potential and that no child as defined in this section and in G. S. 115C-122 shall be excluded from service or education for any reason whatsoever. This policy shall be the practice of the State for children from birth through age 21 and the State requires compliance by all local education agencies and local school administrative units, all local human resources agencies including, but not limited to, local health departments, local social service departments, community mental health centers and all State departments, agencies, institutions except institutions of higher education, and private providers which are recipients of general funds as these funds are defined in G.S. 143-1.

(b) The policy of the State is to provide a free appropriate publicly supported education to every child with special needs. The purpose of this Article is to (i) provide for a system of special educational opportunities for all children requiring special education, hereinafter called children with special needs; (ii) provide a system for identifying and evaluating the educational needs of all children with special needs; (iii) require evaluation of the needs of such children and the adequacy of special education programs before placing children in the programs; (iv) require periodic evaluation of the benefits of the programs to the children and of the nature of the children's needs after placement; (v) prevent denials of equal educational opportunity on the basis of physical, emotional, or mental handicap; (vi) assure that the rights of children with special needs and their parents or guardians are protected; (vii) ensure that there be no inadequacies, inequities, and discrimination with respect to children with special needs; and (viii) bring State law regulations, and practice into conformity with relevant federal law. (1973, c. 1293, ss. 2-4; 1975, c. 563, ss. 1-5; 1977, c. 927, ss. 1, 2; 1979, 2nd Sess., c. 1295; 1981, c. 423, s. 1.)

Marguerite Harrell was the result of several conferences with input from various educational professionals and the parents of the child. See, R. p. 108. The IEP includes the requisite goals and objectives required by 20 U.S.C. § 1401 (19) and 34 C.F.R. 300.346 (1978). The proposed educational program to be offered by the Wilson County schools was to be provided at public expense, at no cost to the parents, in accordance with standards set by the state educational agency and in conformity with the specially tailored IEP. It is clear that the school system complied with applicable statutes and regulations in this matter.

The petitioner further argues that she was denied due process of law because she was not provided with a fair tribunal. Specifically she argues that Mildred Blackburn, a hearing consultant for programs for the hearing impaired in the public schools of North Carolina was biased against residential placements and thereby exerted undue influence on the placement committee's decision.

Due process requires that an individual receive adequate notice and be given an opportunity to be heard. This requirement applies to administrative agencies performing adjudicatory functions. *Goldberg v. Kelly,* 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970). "A fair trial in a fair tribunal is a basic requirement of due process." *In Re Murchison,* 349 U.S. 133, 136, 99 L. Ed. 942, 946, 75 S. Ct. 623, 625 (1955). There is no question that notice requirements of due process were met in this case. In fact, the petitioner stipulated that due process procedures had been followed prior to and during the hearing of this matter before the local hearing officer (R.pp. 101-103). Petitioner's claim that the "bias" of Mildred Blackburn resulted in a denial of due process is ludicrous.

The mere fact that a member of the panel which developed the IEP had expressed a certain professional

opinion on main streaming versus residential placement does not result in a violation of due process. Compare *Trade Commission v. Cement Institute,* 333 U.S. 683, 92 L. Ed 1010, 68 S. Ct. 793 (1948) and *Hortonville District v. Hortonville Education Association,* 426 U.S. 482, 49 L. Ed. 2d 1, 96 S. Ct. 2308 (1976) where the degree of involvement or possible bias was more substantial and the Court rejected the claims of bias. Petitioner's claim should be dealt with in the same manner.

II. THE IEP CLAIM

The petitioner contends that the IEP developed for Marguerite was unresponsive to her needs because the statement of educational performance relied solely on the Peabody Individual Achievement Test and that the IEP is incomplete because the percentage of time to be spent with support services was yet to be determined.

The IEP in this case was developed between 22 August and 28 August 1978. The initial request for an educational expense grant was not made until 17 July 1978 for the 1978-79 school year. Under the circumstances of this case the school board acted diligently and in good faith in evaluating Marguerite's needs and in developing the IEP within this relatively short period of time. The North Carolina Court of Appeals made specific and detailed findings regarding the school system's compliance with applicable statutes and regulations. See Petition Appendix A, pp. 55-69. The Wilson County Schools followed all the procedures required by the Act and petitioner's allegations of incompleteness and improper procedures are an attempt to grasp at straws. The respondents strongly urge the Court to deny the petition on the basis of this claim.

III. APPROPRIATE EDUCATION CLAIM

The petitioner's final claim is that the Wilson County schools could not provide an "appropriate" educational program because it was based on unlawful procedures and because the regular classroom teacher and all but one of her special service providers were not certified to teach children with hearing impairments. For the reasons outlined above and those that follow, this claim is without merit.

Justice Rehnquist delivering the opinion of the *Rowley* Court stated:

> "According to the definitions contained in the Act, a 'free appropriate public education' consists of educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction.... Thus if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional check list are satisfied, the child is receiving a 'free appropriate public education as defined by the Act.'
> 73 L. Ed. 2d at 701

The program designed in the case *sub judice* provided for personalized instruction with sufficient support services to enable the child to benefit from the instruction. This Court made it very clear in *Rowley,* which also involved a hearing impaired child, that the requirement that a state provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children. The requirement of the Act is an appropriate education, not the best education possible.

The school system offered the petitioner an appropriate education to meet her unique individual needs. All procedures mandated by the Act were followed. The decision of the North Carolina Court of Appeals in this regard should be affirmed.

CONCLUSION

The North Carolina Supreme Court was correct in denying further review of the decision of the North Carolina Court of Appeals in this case. Based upon this Court's decision in *Rowley* a complete denial of the Petition for Certiorari is the correct result. There is nothing of substance for this Court to review.

This the 2nd day of February, 1983.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General

Elizabeth C. Bunting
Assistant Attorney General

Kaye R. Webb
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602
Telephone: (919) 733-7387

Z. Hardy Rose
Rose, Jones, Rand & Orcutt, P.A.
P.O. Drawer 2367
Wilson, N.C. 27893
Telephone: (919) 291-3848

ATTORNEYS FOR
RESPONDENTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI was served this day upon counsel for petitioner, by depositing three copies of said brief in the United States Mail, postage prepaid, addressed as follows:

Grover Prevatte Hopkins
Janice Watson Davidson
Hopkins and Allen
212 Main Street
Tarboro, N.C. 27886

This the 2nd day of February, 1983

Kaye R. Webb
Assistant Attorney General